

1999

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Recommended Citation

Dennis Nixon, Elise Golden & Louise Kane, *The Legacy Of The North Cape Spill: A New Legal Environment For The Tug And Barge Industry*, 4 Ocean & Coastal L.J. (1999).

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THE LEGACY OF THE *NORTH CAPE* SPILL: A NEW LEGAL ENVIRONMENT FOR THE TUG AND BARGE INDUSTRY

Dennis Nixon Elise Golden** and Louise Kane****

I. INTRODUCTION

The development of law is not a smooth, linear process. Theories are developed and laws are drafted in response to particular events. Without a truly galvanizing incident, sheer inertia favors the status quo. Oil pollution law is a classic example of event-driven legislation. The loss of the early supertanker *Torrey Canyon* in 1967 led to the Intervention Convention,¹ which clarified a nation-state's rights to defend itself from a vessel leaking oil.² The rust-bucket *Argo Merchant*, lost on Nantucket Shoals in 1977, created the impetus to give the Coast Guard greater regulatory powers over tank vessels through the Port and Tanker Safety Act³ the following year. The loss of the enormous supertanker *Amoco Cadiz* in 1978, while the vessel's master and salvors were arguing over the

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1. 33 U.S.C. § 1471 (1996).

2. 33 U.S.C. § 1472 (1996).

3. 33 U.S.C. §§ 1221-1236 (1996).

terms of the salvage agreement, led to a restructuring of the internationally accepted Lloyd's Open Form Salvage Agreement.⁴ Finally, the dramatic loss of the *Exxon Valdez* in 1989 created the political environment that made the passage of the Oil Pollution Act of 1990 (OPA),⁵ our nation's most encompassing oil spill liability legislation, a reality.

Despite OPA's "great leap forward" in 1990, one segment of the oil transportation business remained largely unregulated: the tug and barge industry. It took the loss of the barge *North Cape* and its towboat *Scandia* to bring this under-regulation to public attention and to create the impetus for major changes in both state and federal law.

A. *The Grounding of the North Cape*

The facts of this case are a chilling reminder of the old adage that "if something can go wrong, it will."⁶ On January 19, 1996, the tug *Scandia* was en route to Providence, Rhode Island, towing the 340-foot, unmanned, single-hulled barge, *North Cape*.⁷ The barge was laden with four million gallons of No. 2 fuel oil which were intended to replenish diminished home-heating oil reserves in Providence, Rhode Island. Inbound from Bayonne, New Jersey, the tug and barge faced dramatically deteriorating weather conditions. A fierce winter storm was raging on Long Island Sound, with near blizzard conditions; seas were reported at fifteen feet and winds of 30-50 knots were blowing from the southeast.⁸ The National Weather Service (NWS) had predicted both the intensity and the time of the storm's arrival for several days.⁹

4. Miller, A., *Lloyd's Standard Form of Salvage Agreement - 'LOF 80' - A Commentary*, 12 J. MAR. L. & COM. 243 (1981).

5. 33 U.S.C. §§ 2701-27611 (1996).

6. MURPHY'S LAW.

7. An excellent technical review of this casualty can be found in *North Cape Grounding Caused by Fire, Weather, Anchoring Problems*, PROF. MARINER, April-May 1998, at 48-52. The *Providence Journal Bulletin*, the state's newspaper of record, has collected all of its coverage of the spill and its aftermath on a special web site: <<http://www.projo.com/horizons/oilspill>>.

8. Tom Morgan, *Tug, Oil Barge Go Aground*, PROVIDENCE J.-BULL. Jan. 20, 1996, at A1.

9. S. Brautigam, *Oil Spills-How Criminal Penalties May Apply in Marine Oil Spills*, PROF. MARINER, June-July 1998, at 58.

At midday, with the flotilla¹⁰ just five miles from "turning the corner" northwards into the more protected waters of Narragansett Bay, fire broke out in the *Scandia's* engine room.¹¹ Alerted by the tug's general alarm system, the six-man crew attempted, unsuccessfully, to fight the fire with three portable carbon dioxide extinguishers, but were prevented from doing so by the intense heat and smoke.¹² At 1:57 p.m., the Captain radioed a distress call to the Coast Guard, reporting that his vessel was ablaze and that he intended to abandon ship.¹³

Just forty-five minutes later, a forty-four foot patrol boat from Coast Guard Station Point Judith arrived on the scene.¹⁴ Huddled on the bow in their survival suits, the crew of the *Scandia* awaited rescue.¹⁵ Sea conditions made it impossible for the patrol boat to come alongside the blazing tug; the crew leapt into frigid Rhode Island Sound and were helped aboard the patrol boat by a Coast Guard rescue swimmer who subsequently had to be helped out of the water himself.¹⁶

After a quick return to Point Judith to drop off most of the crew, the patrol boat returned to the scene at 4:45 p.m. with the *Scandia's* mate and engineer.¹⁷ With the *Scandia* disabled and no other tug in range for a rescue, they planned to lower *North Cape's* anchor and hope that it held before the barge ran aground. Their plan was bold, courageous, and perhaps foolhardy. If they had been successful, they would have been hailed as heroes. The patrol boat cautiously approached the *North Cape*, and at just the right moment the two men, still clad in their survival suits, jumped aboard.

Unfortunately, just three weeks before, the tug's anchor windlass¹⁸ had been removed for repairs. The ordinarily simple job of powering the anchor down was now rendered much more complex. Because the anchor was both tied in place with heavy nylon rope and shackled with wire rope, the two men would have to cut the anchor free to be able to deploy it. The

10. Flotilla, from the Spanish diminutive of *flota*, a fleet, is commonly used to describe a tug with barge in tow.

11. Morgan, *supra* note 8.

12. PROF. MARINER, *supra* note 7, at 50.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 51.

18. A windlass is a winch used to raise and lower an anchor. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2620 (1993).

men jumped aboard, armed only with their knives. With waves breaking over them, and limited by the lack of tools and the clumsy, three-fingered survival suits they still wore, they were unable to release the anchor after nearly an hour of effort.¹⁹ The engineer was able to jump back aboard the patrol boat, however, the mate decided not to risk the jump. Instead, he waited an hour before a Coast Guard helicopter, flying at night in a fierce blizzard, rescued him²⁰

The good news was that no lives would be lost; the bad news was that the *North Cape* was now hard aground in a fierce storm.²¹ Before the night was over, nine of the barge's sixteen compartments were damaged, and some 828,000 gallons of oil escaped into Rhode Island Sound before the remaining cargo could be off-loaded.²²

The barge spilled its cargo of No. 2 fuel oil adjacent to the Trustum Pond National Wildlife Sanctuary and in waters rich with marine life. As a direct result of the oil spill, over 250 square miles of ocean waters were quickly closed to commercial fishing. Recent studies conducted as part of the Natural Resource Damage Assessment (NRDA) process²³ estimate that the oil killed more than 12 million lobsters, 82 million crabs, 679 million mussels, and 81 million surf clams.²⁴ They also estimate that between 2,842 and 5,559 ducks, loons, cormorants and other sea birds died.²⁵ Several coastal ponds, the nursery grounds for coastal fisheries, were also affected. Because No. 2 heating oil is a highly refined product, and because the wind and wave action was so intense on the night of the spill, cleanup efforts had more of a psychological than physical impact.²⁶ The oil quickly mixed into the water column, increasing its toxic impact and minimizing the effectiveness of traditional oil spill skimming equipment.²⁷

19. PROF. MARINER, *supra* note 7, at 50.

20. *Id.*

21. *Id.* at 50-51.

22. See Peter Lord, *Leaking Oil Spreads 12 Miles*, PROVIDENCE J.-BULL., Jan. 22, 1996, at A1.

23. This issue is being hotly disputed by experts hired by the Responsible Party, Eklof Marine. Gary Mauseth of Peak Consultants, Inc., stated "[r]epresentation to an unsophisticated reader that this modeling effort yields an accurate and precise estimate of injury is misleading, to say the best." Peter Lord, *Estimate of Losses from Oil Spill is Growing*, PROVIDENCE J.-BULL., Jan. 8, 1998, at A1.

24. *Id.*

25. *Id.*

26. Oil recovery efforts are most successful in calm seas with unrefined oils. See generally AMERICAN SOC'Y OF ENGINEERS, OIL SPILLS (Spaulding & Reed eds., 1990).

27. Peter Lord, *Grounded Barge Leaks 700,000 Gallons of Heating Oil*, PROVIDENCE

The *North Cape* was repaired and floated free on January 26, 1996.²⁸ The *Scandia*, hard aground on Moonstone Beach, could not be extricated until February 13, 1996.²⁹

This Article was completed exactly two years after the *North Cape* spill occurred on January 19, 1996. Section II will discuss the resulting criminal charges and the criminal penalties assessed on the defendants. The enormously complex Natural Resources Damage Assessment (NRDA)³⁰ has not been completed, nor have the civil actions filed by fishermen and others affected by the spill been resolved.³¹ It will likely be years before either issue is fully settled, particularly because this was the first spill to utilize the National Oceanic and Atmospheric Administration's (NOAA) NRDA regulations, promulgated just two weeks before the spill occurred on January 5, 1996.³² However, the spill's real legacy is not in the details of the civil liability litigation, but in the legislative and regulatory response at the state and federal level to the glaring deficiencies in tug and barge safety regulations. Section III will examine these responses in detail, with a particular emphasis on the process used to move the safety agenda forward.

II. LEGAL REPERCUSSIONS

A. Criminal Charges Resulting from the *North Cape*

Investigators descended upon the site of the spill almost immediately.³³ The University of Rhode Island, known for its marine programs and located

J.-BULL., Jan. 20, 1996, at A1.

28. See Tom Mooney and B. Jones, *North Cape Pulled Free From Site of Devastation*, PROVIDENCE J.-BULL., Jan. 27, 1996, at A1.

29. See J. Beardsworth, *Beached Scandia Set Free at Last*, PROVIDENCE J.-BULL., Feb. 13, 1996, at A1.

30. The computer modeling of the scientific assessment is so complex, the National Oceanic and Atmospheric Administration scheduled a two-day training program in February, 1998 for individuals who wanted to learn how the scientists arrived at their estimates of oil spill damage. See Peter Lord, *Meeting Set to Explain Computer Data*, PROVIDENCE J.-BULL., Jan. 8, 1998, at A7.

31. More than 600 fishermen and businesses hurt by the spill still have claims pending against Eklof as of this article's submission date. Tom Mooney and Zachary Malinowski, *Owner of North Cape Barge Agrees to Pay \$9.5 Million*, PROVIDENCE J.-BULL., Jan. 10, 1998, at A1.

32. 60 Fed. Reg. 440 (1996).

33. Lord, *supra* note 22, at 5.

just a few miles from the spill site, sent teams of students and faculty to measure the spill's size and toxicity, assist in the cleanup effort, and measure its economic impact on the state's key tourism and fishing industries. Meanwhile, teams from the Coast Guard, the Environmental Protection Agency, the National Oceanic and Atmospheric Administration, the National Transportation Safety Board, the U.S. Fish and Wildlife Service, the Federal Bureau of Investigation, the U.S. Attorney's Office, The Rhode Island Attorney General's Office, the Coastal Resources Management Council, and the Department of Environmental Management all responded in accordance with their respective legislative mandates.³⁴ On another front, discussed in Section III of this article, legislators at both state and federal levels convened hearings to evaluate the effectiveness of the current regulatory system.³⁵ No stone would be left unturned.

From the outset, most of the attention was given to the NRDA process, commissioning a wide range of studies, and the lawsuits filed by commercial fishermen, many of whom relied upon charity for their basic needs while fishing grounds were closed. The general public understood that the cleanup would cost millions, and that the civil damages would be even greater,³⁶ but did not realize that the facts leading up to the spill might lead to criminal charges.³⁷ However, as one experienced maritime practitioner recently observed: "One of the hallmarks of recent pollution legislation is the reinvigoration of the criminal aspects of such conduct. This approach holds that both individuals and their corporations are, more than ever, prime targets in a pollution criminal prosecution."³⁸

Although gross negligence was recognized for many years as providing the basis for criminal liability, the Oil Pollution Act of 1990 made it a crime to negligently discharge oil into or upon the navigable waters or contiguous zone of the United States, in such quantities as may be harmful.³⁹ With that in mind, U.S. Attorney Sheldon Whitehouse took the

34. Peter B. Lord, *Special Report: Oil in the Water*, PROVIDENCE J.-BULL., Jan. 28, 1996, sec. B.

35. See Tom Mooney, *Senate Commission Opens Hearings on Preventing Spills*, PROVIDENCE J.-BULL., Feb. 3, 1996, at 1; see also *Committee Grills Coast Guard Over Delay in New Safety Rules*, PROVIDENCE J.-BULL., Feb. 15, 1996, at B1.

36. As of this date, Eklof has spent more than \$10 million to clean up the spill and to compensate some of the fishermen and businesses damaged by it. Lord, *supra* note 23.

37. Mooney and Malinowski, *supra* note 31.

38. Francis J. Gonyor, *Dangerous Waters Without a Chart: Pollution Problems as They Relate to Tugs and Barges*, 70 TUL. L. REV. 549, 558 (1995).

39. 33 U.S.C. §§ 1321(b)(3); 1319(c)(1)(A) (1996).

lead in a coordinated, federal-state criminal investigation which, over 18 months, quietly built a case against the corporations which owned the tug and barge, the President of Eklof Marine, Leslie Wallin, and the skipper of the *Scandia*, Gregory Aitken.

On September 25, 1997, Whitehouse called a press conference to announce that he had filed a 15-page Criminal Information against the three corporations, Wallin, and Aitken, alleging violations of the Oil Pollution Act,⁴⁰ the Refuse Act,⁴¹ and the Federal Migratory Bird Treaty Act⁴² in U.S. District Court.⁴³ At the same time, Rhode Island Attorney General Jeffrey Pine announced the filing of a Criminal Information against the corporate defendants for violation of the Rhode Island Pollution Control Act.⁴⁴ The headline news was that all of the parties agreed to plead guilty to all of the charges, and pay a total of \$9.5 million in criminal fines and other costs.⁴⁵

1. *The Federal Criminal Information*

The bulk of the federal Criminal Information was devoted to the charge of negligent discharge of oil under the Oil Pollution Act.⁴⁶ The U.S. Attorney cited four specific areas of negligent behavior: a) the weather forecast; b) the missing anchor windlass; c) firefighting equipment; and d) fire hazards aboard the *Scandia*.

a. *The Weather Forecast*

Several days before the two vessels began their voyage in Bayonne, New Jersey, a severe winter storm had been predicted for the waters off the coast of Rhode Island. Fleet Weather Service, a private weather service under contract with the defendant, Eklof, to provide weather information,

40. *Id.*

41. 33 U.S.C. §§ 407, 411 (1996).

42. 16 U.S.C. §§ 703, 707(a) (1996).

43. News Release, U.S. Dept. of Justice, U.S. Attorney Sheldon Whitehouse, *Eklof Marine to Admit Criminal Liability in North Cape Spill, Will Pay \$8.5 Million*, (Sept. 25, 1997).

44. R.I. GEN. LAWS § 46-12.5-3 (1996).

45. Peter Lord, *Tug Owner Agrees to Pay \$9.5 Million for North Cape Spill*, PROVIDENCE J.-BULL., Sept. 26, 1997, at 1.

46. Because there have been relatively few criminal prosecutions under the law, the degree of negligence alleged is useful to document for future applications of the law.

faxed storm warnings to both Eklof Marine headquarters and to the defendant, Aitken, aboard the *Scandia* on January 19, 1996.⁴⁷ By noon that day, all of the vessels in Eklof's fleet that were in the vicinity of New York Harbor, Long Island Sound, and Rhode Island Sound, with the exception of the *Scandia* and the *North Cape*, reported to Eklof that they had gone "weatherbound;" that is, they remained in safe harbor to wait out the storm.⁴⁸ When *Scandia* Captain Gregory Aitken was asked by U.S. District Court Judge Mary Lisi at the sentencing hearing why he alone chose to be at sea that day, he responded, "I thought I could outrun the storm[.]"⁴⁹

b. The Missing Anchor Windlass

One of the most remarkable facts disclosed by the investigation was that the *North Cape* left the safety of Bayonne harbor and headed into a fierce winter storm without its anchor windlass and steel anchor cable. The windlass had broken and been removed for repair several weeks prior. Defendant Leslie Wallin, Eklof's shoreside manager, directed the crew to use a shackle, wire, and rope to create a makeshift rigging to hold the anchor in place.⁵⁰ The steel anchor cable was replaced with polypropylene rope, which may or may not have had the tensile strength to hold the barge even if the anchor was successfully deployed.⁵¹ As discussed earlier, despite the valiant efforts of two crew members, they could not release the anchor under the conditions when it was most needed: adrift, and approaching a lee shore. Without the option of dropping anchor in a safe harbor, defendant Gregory Aitken, the Captain of the *Scandia*, had no other option but to press on through the storm – unlike every other vessel in the Eklof fleet that day which had successfully anchored and waited out the bad weather. Although the Coast Guard did not require vessels to carry an operable anchor system aboard, the Criminal Information alleged that it was negligent to leave port without one, particularly in those weather conditions.⁵²

47. Criminal Information for United States of America v. Eklof Marine, et al. at 5-6, (Sept. 25, 1997) [hereinafter Eklof Information].

48. *Id.* at 5-7.

49. Mooney and Malinowski, *supra* note 31.

50. Eklof Information, at 7-9.

51. *Id.* at 7-8.

52. *Id.* at 10.

c. *Firefighting Equipment*

This was not the first time a fire had occurred aboard the *Scandia*. The investigation revealed that on March 5, 1995, an engine room fire ignited while the *Scandia* was docked in New Haven, Connecticut.⁵³ Remarkably, the Captain at the time reported that the crew was only able to extinguish the fire after borrowing firefighting suits and self-contained breathing apparatus from the New Haven Fire Department.⁵⁴ In his report on this incident, the Captain recommended that such equipment be required for the vessel in the future; his recommendation was not followed.⁵⁵

The *Scandia* was not equipped with a remotely operated fire suppression system, which has become the industry standard for vessels of this size and class.⁵⁶ Remote switches are typically located on the bridge and the crew quarters, where they can be quickly activated when the fire alarm sounds.⁵⁷ Such a system would have automatically shut off all fuel and ventilation leading to the engine room, and would have flooded the engine room with an inert gas, such as carbon dioxide.⁵⁸

Thus, the Criminal Information alleged that Eklof, Wallin, and Thor were negligent for failing to have either an operable, automatic firefighting system or the appropriate equipment to make manual firefighting possible.⁵⁹

d. *Fire Hazards Aboard the Scandia*

The Criminal Information also alleged that there were several conditions aboard the *Scandia*, resulting directly from the negligence of Eklof and Thor, that contributed to the severity of the fire: 1) Eklof had no preventive maintenance program; 2) Eklof did not maintain records of the maintenance and repairs it performed; 3) Oily gloves and oily rags were kept in a plastic milk crate on a wooden cabinet located in the engine room. The unsecured cabinet fell over at some point, contributing either to the risk of fire or the flames; 4) A clothes dryer located in the engine room malfunctioned in that the automatic shutoff did not work. The dryer ran

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 11.

57. Eklof Information at 11.

58. *Id.*

59. *Id.*

continuously unless manually turned off; 5) For several months, crew members complained of receiving electrical shocks while aboard the *Scandia*. The source of the electrical shocks was never diagnosed or repaired; and 6) Contrary to Coast Guard requirements, the engine room door was generally left open during vessel operation. Saltwater entering the engine room and coming into contact with electrical components can cause a short circuit, leading to a fire.⁶⁰

The cumulative impact of all of the above, in the view of the U.S. Attorney, was more than enough to demonstrate that the defendants had "negligently discharged oil" under the terms of the Oil Pollution Act.⁶¹ Count II of the Information, under the Refuse Act, simply alleged that the defendants had "deposited refuse matter, namely 828,000 gallons of No. 2 heating oil, from a ship, the Barge *North Cape*, into . . . navigable waters."⁶² Count III, under the Migratory Bird Treaty Act, alleged that the defendants "did kill migratory birds."⁶³

2. *The State Criminal Information*

The one page Rhode Island criminal information announced at the same time charged Eklof Marine, Thor Towing, and Odin Marine with a violation of the Rhode Island Oil Pollution Act, §§ 46-12.5-10 and 46-12.5-10 of the Rhode Island General Laws. The maximum statutory penalties for violation of the law are a fine of \$25,000 per day or imprisonment for not more than five years, or both.

3. *The Resulting Plea Agreement*

At the same time the criminal charges were announced, the corporate defendants agreed to plead guilty to all three counts of the federal Criminal Information and the one count of the state Criminal Information for

60. *Id.*

61. *Id.* at 14.

62. *Id.*

63. *Id.* Loons, common eiders, goldeneyes, mergansers, buffleheads, horned grebes, red-necked grebes, and herring gulls were all found on the beach after the spill. *Id.* at 4.

violation of the Rhode Island Oil Pollution Act.⁶⁴ Aitken and Wallin, charged only under the Oil Pollution Act, pled guilty as well.⁶⁵

The Plea Agreement with the corporate defendants was rather complex.⁶⁶ First, they agreed to pay a fine of \$3.5 million for violation of the federal laws: \$100,000 for violation of the Oil Pollution Act, \$400,000 for violation of the Refuse Act; and, \$3,000,000 for violation of the Migratory Bird Treaty Act. Under the terms of the Migratory Bird law, the latter amount would be appropriated to the Department of the Interior to carry out approved wetlands conservation projects.⁶⁷ Further, they agreed that payment of the criminal fine in no way affected any civil liability action from any federal, state, local, or private party, particularly the NRDA under OPA. The defendants also agreed to be placed on probation for three years, with a special condition that the following remedial measures be taken for all of their vessels which pass within 12 miles of the Rhode Island coast:

1. Defendants will use only barges with operable anchor systems, which include a working anchor windlass.
2. Defendants will equip all of their self-propelled vessels with safe and effective, remote-controlled fire suppression systems and will properly train all crew members in their safe and proper operation.
3. Defendants will equip all of their vessels with at least two SCBAs (self-contained breathing apparatus) and at least two firefighting suits, and will properly train all crew members in their safe and effective use.
4. Defendant will cease use of unmanned, single-hulled oil barges.⁶⁸

Compliance with the agreement will be monitored by an independent consultant, approved by the government; if they fail to comply with the conditions above, they will be subject to an additional \$1 million fine.⁶⁹

64. See Plea Agreement, *United States v. Eklof, Thor, Odin*, at 1.

65. See Plea Agreement, *United States v. Gregory Aitken*, at 1; Plea Agreement, *United States v. Leslie Wallin*, at 1.

66. See Mooney & Malinowski, *supra* note 31.

67. American Wetlands Conservation Act § 7, 16 U.S.C. § 4406(b) (1996).

68. Plea Agreement, *supra* note 64, at 6.

69. See Mooney & Malinowski, *supra* note 31.

One of the unusual aspects of this plea agreement is that beyond the criminal fines, the defendants "volunteered" to donate an additional \$1.5 million to the Nature Conservancy.⁷⁰ The money will be used to acquire ecologically significant property in the immediate vicinity of the oil spill along Rhode Island's South Shore.⁷¹

Finally, the corporate defendants also agreed to pay a \$3.5 million criminal fine to the State of Rhode Island for violation of the state oil spill law.⁷² The net result was an agreement to pay a total of \$8.5 million, with a potential for a further payment of \$1 million if terms of the probation agreement are not followed. That makes it the largest criminal fine paid in Rhode Island history, the largest environmental fine in New England history, and the third largest oil spill fine ever assessed, according to U.S. Attorney Whitehouse.⁷³ Douglas Eklof, representing Eklof Marine, stated: "We accept responsibility for the event and believe that the process which resulted in today's agreement has been fair and appropriate."⁷⁴

The plea agreement for the corporate defendants was accepted by the court at its sentencing hearing on January 9, 1998.⁷⁵ Attorneys for the corporate defendants, after handing over checks for \$3.5 million in both the U.S. District Court and the Rhode Island Superior Court, asserted that Eklof has substantially upgraded the forty vessels in its fleet since the incident in question, and was "90% in compliance" with the terms of the probation by the sentencing date.⁷⁶ Captain George Ireland, a retired Coast Guard officer and former Captain of the Port of Providence, was appointed by the Federal District Court to supervise the terms of the probation regarding the upgrading of their equipment and training.⁷⁷

The sentencing of the individual defendants, Aitken and Wallin, involved the possibility of prison terms for both. However, U.S. District Court Judge Mary Lisi accepted the recommendation of the U.S. Attorney's

70. The Nature Conservancy is a national, not-for-profit organization whose mission is to protect ecologically significant sites through land conservation. See Plea Agreement, *supra* note 64, at 8.

71. See Mooney & Malinowski, *supra* note 31.

72. *Id.*

73. See News Release, *supra* note 43, at 2.

74. Lord, *supra* note 45.

75. See Mooney & Malinowski, *supra* note 31.

76. Oral remarks of Thomas J. Kelly, Counsel for Defendants Eklof Marine, Thor Towing, and Odin Marine at Sentencing Hearing before Federal District Court Judge Mary Lisi, Providence, Rhode Island (Oct. 6, 1997).

77. Personal Communication from Assistant U.S. Attorney Ira Belkin to Dennis Nixon at Sentencing Hearing, (Oct. 6, 1997).

Office and placed both on probation.⁷⁸ In addition, she imposed a personal criminal fine on Captain Aitken in the amount of \$10,000, and a substantial \$100,000 for part owner and corporate officer Wallin, who headed Eklof Marine's vessel maintenance program.⁷⁹ Aitken, Wallin, and Douglas Eklof, representing the corporate defendants, all gave personal apologies to the court, the people of Rhode Island, and in particular to the fishermen whose livelihoods were disturbed for so long.⁸⁰

U.S. Attorney Whitehouse, who spearheaded the multi-agency criminal investigation by the federal and state governments, concluded the day with the following statement:

These fines are the largest imposed ever for an oil spill within the continental United States. They serve notice on oil polluters that our land and water are precious and that fouling them has a heavy price. As Judge Lisi correctly noted, this is a 'wake-up call for the industry.' We expect this will raise the standard of safety for the oil transportation industry.⁸¹

III. THE LEGISLATIVE AND REGULATORY RESPONSE TO THE *NORTH CAPE* OIL SPILL

Just days after the *North Cape* grounded, the Rhode Island General Assembly initiated a legislative response to the spill which would quickly spread to involve neighboring New England states, the tug and barge industry, the U.S. Coast Guard, and Congress. What began as a preventable marine casualty in the coastal waters of the smallest state soon became a major focusing event for regulating the safety of towing vessel and tank barge safety regulations. The initial response began in 1996 in the Rhode Island Statehouse with the introduction of a groundbreaking oil spill prevention bill. Within two years, the Rhode Island legislative response to the *North Cape* spill expanded to include three separate bills in U.S. Congress,⁸² several state-level legislative initiatives,⁸³ numerous hearings

78. See Mooney & Malinowski, *supra* note 31.

79. See *id.*

80. See *id.*

81. News Release, U.S. Department of Justice, U.S. Attorney Sheldon Whitehouse, *Eklof Fined \$7,000,000 for North Cape Oil Spill*, (January 9, 1997) at 2.

82. Towing Vessel Safety Act of 1996, H.R. 4982, 104th Cong. (1996); Barge Safety Act of 1996, H.R. 3014, 104th Cong. (1996); Oil Spill Prevention and Response

by state legislatures and Congressional committees,⁸⁴ and the formation of a Regional Risk Assessment Team.⁸⁵ Ultimately, elements of each of these responses to the *North Cape* were incorporated into an October, 1997 Coast Guard proposed rule;⁸⁶ as a result the regulatory impacts of the Rhode Island *North Cape* spill became national in scope.

A. *The Rhode Island Legislative Response*

1. *The Special Senate Commission*

Even as the *Scandia* and *North Cape* lay grounded off Moonstone Beach, Rhode Island's political leadership had begun to consider whether the state would respond to the oil spill and how it could do so.⁸⁷ Consequently, on January 23, 1996, Rhode Island Senate Majority Leader Paul S. Kelly convened a Special Senate Commission to investigate the events which led up to the *North Cape* oil spill, and to identify measures to prevent future spills in Rhode Island waters.⁸⁸ The Special Senate Commission (Commission) investigating the *North Cape* Oil Spill was composed of eight members, and was chaired by State Senator Domenic DiSandro.⁸⁹ This bipartisan committee conducted several investigative hearings focused

Improvement Act, S. 1730, 104th Cong. (1996).

83. In February, 1996, the Connecticut legislature introduced An Act Concerning Pilotage and Safety Requirements for Certain Tank Vessels, Conn. Raised bill no. 365 (1996). On April 8, 1996, the Massachusetts Governor William R. Weld introduced a bill into the Massachusetts General Assembly entitled An Act Establishing Safety Requirements for Tank Barges. HB No. 5938, to amend Mass. Gen. Laws Ch. 21 (1996). Neither bill was enacted.

84. In addition to the Rhode Island Senate hearings and the U.S. Senate Committee on the Environment and Public Works hearings discussed in this text, both the Massachusetts and Connecticut state legislatures held hearings on the bills described in the previous note.

85. In June, 1996 the U.S. Coast Guard First District formed a Quality Action Regional Risk Assessment Team, consisting of industry, government, and environmental organization representatives from the New England coastal states.

86. Towing Vessel Safety, 62 Fed. Reg. 52,057 (1997) (to be codified at 33 C.F.R. § 155, 46 C.F.R. §§ 25, 27, and 32) (proposed Oct. 6, 1997).

87. ELISE E. GOLDEN, RHODE ISLAND SENATE BRIEF, LEGISLATIVE RESPONSE TO THE *NORTH CAPE* OIL SPILL, (Jan. 22, 1996).

88. RHODE ISLAND SPECIAL SENATE COMM'N INVESTIGATING THE IMPLICATIONS OF THE *NORTH CAPE* OIL SPILL, FINAL REPORT (1996).

89. At the time of the *North Cape* spill, Senator DiSandro represented the coastal Rhode Island communities of Narragansett and South Kingstown, and many of his constituents were commercial fishermen.

on identifying the causes of the oil spill and evaluating the effectiveness of state-level response to the spill.⁹⁰ The information gathered through these hearings was to be used by the Commission members to determine whether the state should take legislative action to protect the state against the threat of future oil spills.⁹¹

The Commission conducted a series of three investigative hearings. The first of these hearings occurred on February 2, 1996 at the Rhode Island Statehouse in Providence, where testimony was provided by representatives of state and federal agencies, and by members of the academic community.⁹² The first hearing was well-attended, and was covered extensively by the local media.⁹³ After opening remarks by Senator DiSandro, testimony was presented by the first panel of witnesses from the Rhode Island Department of Environmental Management (RIDEM).⁹⁴ RIDEM Director Tim Keeney coordinated the testimony of several attorneys for the Department and personnel who were involved with the on-scene response to the *North Cape* spill. The RIDEM testimony skirted the issue of damage assessment, noting that with litigation pending, no affirmative statements about natural resource damages could be made.⁹⁵ Instead, the testimony provided by RIDEM was primarily descriptive, recounting the protocol followed during the response effort.⁹⁶

The RIDEM testimony was followed by the testimony of U.S. Congressman Jack Reed who, together with Congressman Patrick Kennedy,⁹⁷ reintroduced the Towing Vessel Safety Act of 1996 (TVSA) into the House of Representatives on February 1, 1996.⁹⁸ The TVSA contained safety

90. RHODE ISLAND SPECIAL SENATE COMM'N, *supra* note 88.

91. *See id.* at 2-3.

92. Faculty members from the University of Rhode Island (U.R.I.) and the Graduate School of Oceanography at U.R.I. were invited to testify throughout the hearing process regarding issues within their respective areas of expertise.

93. Local television news crews representing all three of the major networks dispatched cameras to the first hearing. In addition, press coverage was extensive in the Providence newspaper as well as in other local papers. *See, e.g.,* Tom Mooney, *Senate Commission Opens Hearings on Preventing Spills*, PROVIDENCE J.-BULL., Jan. 29, 1996, at A1; *State Weighs Tougher Shipping Regulations*, NEWPORT DAILY NEWS, Jan. 29, 1996, at C1.

94. RHODE ISLAND SPECIAL SENATE COMM'N, *supra* note 88, at 19-20.

95. *See id.* at 20.

96. *Id.*

97. Congressmen Kennedy and Reed both represented the State of Rhode Island in the U.S. House of Representatives. In the November 1996 election, Congressman Reed successfully ran for the U.S. Senate seat of retiring Senator Claiborne Pell.

98. Towing Vessel Safety Act of 1996, H.R. 4982, 104th Cong. (1996). In 1993 and 1994, identical legislation had been introduced by Massachusetts Congressman Gerry

equipment requirements and personnel standards for uninspected towing vessels operating in U.S. waters, and would have required basic safety and navigational equipment aboard vessels such as the *Scandia*. In his testimony, Congressman Reed stated that the Towing Vessel Safety Act was only the first step, and that there was room for the state to proceed with its own course of action to further strengthen the regulatory framework governing vessels which transport oil through state waters.⁹⁹

Several other individuals, representing diverse interests ranging from oil spill cleanup contractors to non-profit environmental groups, testified at the February 2 hearing.¹⁰⁰ However, it was a Marine Affairs Professor from the University of Rhode Island who provided the testimony which effectively focused the legislative efforts of the Special Senate Commission.¹⁰¹ In his testimony, Professor Dennis Nixon posed three questions for the legislators to consider in designing their response to the oil spill: 1) why did the *Scandia* leave port in the face of a well-forecasted winter storm;¹⁰² 2) why was the *Scandia* not equipped with a fire suppression system which could be remotely deployed from the wheelhouse or galley;¹⁰³ and 3) why should an unmanned, single-hulled tank barge, with an inoperable anchor system, be permitted to carry millions of gallons of oil through state waters.¹⁰⁴ In his discussion of this final point, Nixon noted that although the operating conditions of the tug and barge seemed intuitively unsafe, neither the *Scandia* nor the *North Cape* were in violation of a single federal law.¹⁰⁵ The sum effect of Nixon's testimony focused the attention of the

Studds, however neither bill ever made it through Congress.

99. RHODE ISLAND SPECIAL SENATE COMM'N, *supra* note 88, at 21. This is an important statement because the issue of preemption arose repeatedly in the context of the Rhode Island state-level legislative response to the spill. The Senator's statement indicated that he did not intend his towing vessel safety bill to preempt the state's right to proceed along their own legislative course of action.

100. *Id.* at 21-24.

101. Interview by Elise Golden with Domenic DiSandro and Charles Fogarty, Rhode Island State Senators, in Providence, R.I. (Feb. 3, 1996).

102. The weather forecast for several days prior to the *Scandia's* departure indicated that a violent storm would hit southern New England on January 19, 1996. See earlier textual discussion of circumstances surrounding *North Cape* spill. See Morgan, *supra* note 8.

103. The *Scandia* had, in fact, suffered a severe engine fire less than one year previous to the Rhode Island spill. See Elizabeth Abbott, *Grounded Tug Has Seen Bottom Before*, PROVIDENCE J.-BULL., Jan. 25, 1996, at C1.

104. RHODE ISLAND SPECIAL SENATE COMM'N, *supra* note 88, at 22.

105. Professor Nixon, in his testimony, noted that while the Coast Guard has safety regulations mandating operable anchors aboard most pleasure craft, no such requirement exists for the tank barges which haul millions of gallons of oil through our coastal waters.

Commission on several key regulatory issues, including double hull requirements for tank barges, requirements for operable anchor systems aboard tank vessels, personnel considerations such as placing crew aboard a tank barge to deploy an anchor in the event that a tug is disabled, and ensuring that fire suppression systems may be remotely accessed aboard towing vessels.¹⁰⁶

Professor Nixon also suggested, in his testimony, that the Coast Guard consider redesignating the waters of Block Island Sound as "offshore" rather than "inland" waters. In inland waters, vessels may be more heavily loaded so that they sit deeper in the water with less freeboard.¹⁰⁷ Vessels that travel through offshore waters are required to carry less cargo so that they have a higher level of reserve buoyancy.¹⁰⁸ Professor Nixon asserted that if the Coast Guard were to change the designation of Block Island Sound, vessels that transit Rhode Island waters would be prepared for an open-ocean journey and be better able to react to the harsh winter storms and high sea states which are so common in these waters.¹⁰⁹ This suggestion, too, was incorporated into the legislative package designed by the Senate Commission.¹¹⁰ At the completion of the first hearing, the Rhode Island legislators had effectively focused their efforts on creating stricter safety standards for towing vessels and tank barges transporting oil through state waters.¹¹¹

The second investigative hearing conducted by the Special Senate Commission occurred on February 7, 1996. The testimony presented at this hearing focused on the identification and quantification of the environmental and economic impacts of the spill. The Executive Director of the Rhode Island Economic Development Corporation testified regarding efforts to provide short and long-term financial relief for individuals and businesses who had suffered losses as a result of the *North Cape* oil spill.¹¹² Representatives of the lobster industry and shellfish aquaculture industry testified regarding the anticipated effects of the spill on local fisheries, especially

Nixon stated that he found it alarming that no such mandatory anchor regulation exists for tank barges. *Id.*

106. RHODE ISLAND SPECIAL SENATE COMM'N, *supra* note 88, at 23.

107. *Id.* at 22-23.

108. *Id.* at 23.

109. *Id.*

110. S.J. 96-S 3300, Jan. Sess. (R.I. 1996).

111. Interview by Elise Golden with Domenic DiSandro and Charles Fogarty, Rhode Island State Senators, in Providence, R.I. (Feb. 3, 1996).

112. RHODE ISLAND SPECIAL SENATE COMM'N, *supra* note 88, at 25.

the inshore lobster fishery.¹¹³ Testimony was provided by a representative of NOAA regarding the NRDA process.¹¹⁴ A Dean from the Graduate School of Oceanography at the University of Rhode Island also read testimony regarding the various *North Cape*-related research endeavors which faculty had undertaken since the spill occurred.¹¹⁵

The second hearing of the Special Commission helped to identify several additional issues related to the *North Cape* spill, such as the need for a uniform protocol for determining whether oiled seafood is safe for human consumption, and the need to provide short-term economic relief for fishermen when oil spills impact fishing grounds.¹¹⁶ However, by the time the second Commission hearing had begun, the Senate staff had already drafted an outline of what was to become the state's legislative response to the *North Cape* spill.¹¹⁷ In fact, Senator DiSandro opened the second hearing by announcing that in response to the testimony presented at the first hearing, the Commission had identified three major directives.¹¹⁸ The first two legislative actions proposed by the Commission were both memorializations to the U.S. Congress; one calling for passage of the Towing Vessel Safety Act of 1996, and the other asking that the Coast Guard change the designation of Rhode Island Sound from inland to offshore waters. The third legislative initiative was to revise state oil spill laws to address safety standards and operating procedures within the coastal tug and tank barge industry.¹¹⁹

The legislative agenda thus established, the third hearing of the Special Senate Commission focused on identifying specific safety measures and strategies to incorporate into the impending state legislation.¹²⁰ Mr. Josh Fenton, a lobbyist from RIDEM, presented several suggestions for regula-

113. The *North Cape* spill caused massive die-offs of juvenile lobster populations. It is estimated that the impact of the North Cape lobster kill will be felt for many seasons to come, due to the large number of juvenile lobsters that washed ashore. See Elizabeth Abbott, *Fishing, Lobster Industries Crippled*, PROVIDENCE J.-BULL., Jan. 22, 1996, at A1.

114. Marguerite Matera testified on behalf of the National Oceanic and Atmospheric Administration regarding the NRDA process. See RHODE ISLAND SPECIAL SENATE COMM'N, *supra* note 88, at 28.

115. *Id.* at 29.

116. *Id.* at 25-31.

117. *Id.* at 25.

118. *Id.*

119. *Id.*

120. This hearing occurred on February 16, 1997 in the Rhode Island Statehouse. RHODE ISLAND SPECIAL SENATE COMM'N, *supra* note 88, at 32-40.

tory and legislative action.¹²¹ Mr. Fenton's testimony set the tone for the position which RIDEM would assume during the course of the legislative response. RIDEM's position, and indirectly the Governor's position,¹²² was that any legislative action taken should not overstep the regulatory authority of the state, and that Rhode Island should not attempt to implement standards that would cripple the industry responsible for supplying the state with petroleum products.¹²³ Mr. Fenton suggested that the state consider designating traffic lanes for barge traffic, and that tug escorts be considered as one method of spill prevention, provided they could be acquired at a reasonable rate to the vessel operator.¹²⁴ In his testimony, Mr. Fenton also indicated that the state should consider designating certain marine areas as environmentally sensitive or particularly vulnerable to the threats of oil pollution, and should exclude petroleum-laden vessels from transiting these areas.¹²⁵ Mr. Fenton's testimony presented a stern warning to avoid unilateral state action, which might lead to an embargo of Rhode Island, ports by the tug and barge industry.¹²⁶

Mr. Michael Rubin, Assistant Attorney General for the State of Rhode Island, testified before the Commission regarding the requirements of OPA, and the relationship of the federal law to the *North Cape* spill. Mr. Rubin focused specifically on the claims process for individuals impacted by the spill.¹²⁷ The Senators questioned Mr. Rubin specifically about the legal implications of state action in attempting to regulate the tug and barge industry.¹²⁸ Mr. Rubin indicated that as long as a state law or requirement did not directly conflict with an existing federal standard, it would likely

121. See *id.* at 32-33.

122. In Rhode Island, the Department of Environmental Management (RIDEM) operates at the direction of the Executive Office; therefore, Rhode Island Governor Lincoln Almond has considerable input into policy decisions made by RIDEM. Because Governor Almond is a member of the Republican party, and both houses of the Rhode Island General Assembly have a Democratic majority, the relationship between the Executive Office and the state legislature has been described as adversarial. Interview with Robert Bromley, Rhode Island Senate Deputy Policy Advisor, (Jan. 1996).

123. The implication of this statement was that the legislative proposals being considered by Rhode Island, specifically those which imposed safety standards and equipment requirements for tugs and barges operating in state waters, represented an improper expression of state regulatory authority. Interview by Elise Golden with Josh Fenton, Rhode Island Department of Environmental Management, in Providence, R.I. (Feb. 16, 1996).

124. RHODE ISLAND SPECIAL SENATE COMM'N, *supra* note 88, at 32-33.

125. See *id.* at 33.

126. See *id.*

127. See *id.* at 34-35.

128. See *id.* at 35.

withstand legal challenge.¹²⁹ Mr. Rubin also indicated that, contrary to the assertions of Mr. Fenton, antitrust laws would preclude any industry embargo of Rhode Island should the state implement stricter safety requirements.¹³⁰

The U.S. Coast Guard was invited to testify at the first hearing of the Special Commission, but declined this invitation based on advice from the U.S. Attorney regarding pending investigations and lawsuits.¹³¹ However, at the third hearing, Captain of the Port of Providence, Captain Barney Turlo, United States Coast Guard, did present testimony regarding the role of the Coast Guard in oil spill response efforts.¹³² Captain Turlo also discussed rulemaking initiatives regarding towing vessel and tank barge safety, and echoed a statement made by Vice Admiral Henn¹³³ that a set of final rules for safety requirements aboard U.S. towing vessels would be issued by the Coast Guard in the summer of 1996.¹³⁴ Captain Turlo's testimony suggested that the federal government, through the U.S. Coast Guard, has singular authority to create and enforce vessel safety standards, and that state legislative efforts would be best focused elsewhere.¹³⁵

A panel of experts from the University of Rhode Island¹³⁶ also presented testimony at the third hearing, as did the Manager of the Trustum National Wildlife Refuge.¹³⁷

129. *See id.* The Oil Pollution Act of 1990 contains specific non-preemption provisions, which preserve the authority of state governments to impose "additional liability or requirements with respect to" the discharge of oil or any removal activities. 33 U.S.C. § 2718 (1994).

130. RHODE ISLAND SPECIAL SENATE COMM'N, *supra* note 88, at 35.

131. *See id.* at 19.

132. *See id.* at 36.

133. *See id.* Vice Admiral Henn is the Vice Commandant of the United States Coast Guard.

134. This rule was issued in final form in July, 1996. Operational Measures to Reduce Oil Spills from Existing Tank Vessels without Double Hulls, 61 Fed. Reg. 147 (1996) (to be codified at 33 C.F.R. pt. 157 and 46 C.F.R. pts. 31 and 35).

135. *See* RHODE ISLAND SPECIAL SENATE COMM'N, *supra* note 88, at 36.

136. *See id.* at 38-39. The panel from U.R.I. included Professor Peter Payton, an ornithologist and resident expert on seabird ecology, as well as Professor Joseph DeAlteris, a fisheries biologist who conducted extensive sampling following the spill, testing the level of hydrocarbons in the seawater and sediments at different time intervals after the oil spill.

137. *See id.* at 39-40. Charles Hebert, Manager of the Trustum National Wildlife Refuge, testified regarding environmental damage to the Trustum NWR, parts of which were severely impacted by the *North Cape* spill. *See id.* Mr. Hebert provided detailed testimony regarding his perception of the impacts of the spilled oil on migratory bird populations, as well as on other species which inhabit the coastal ponds near Moonstone Beach. *See id.* at 40.

During the hearing process, and for many months thereafter, the staff for the Special Senate Commission conducted extensive research on oil pollution prevention law and policy, focusing on those statutes and regulations already in place in other states.¹³⁸ The results of this research, combined with the information gleaned through the investigative hearings, were compiled by the Special Commission staff into a final document which described the findings of the investigation and outlined the legislative proposals developed by the Commission based on these findings.¹³⁹

The Final Report of the Special Senate Commission Investigating the *North Cape* Oil Spill (the Report) contained four major findings. The first finding concluded that the coastal tug and barge industry as it currently operated in the United States was highly under-regulated.¹⁴⁰ The second finding asserted that although it is primarily the duty of the United States Coast Guard to promulgate vessel regulations, there is ample legal precedent to justify the development of aggressive state-level policies to protect local marine resources from the threat of oil spills.¹⁴¹ The Commission's third finding stated that Rhode Island should follow the example set by states such as California, Alaska, Wisconsin and Washington, each of which has enacted aggressive pollution prevention statutes.¹⁴² The fourth finding by the Commission maintained that any legislation forthcoming from Rhode Island should not intend to supersede federal law, but should only serve to protect the state's coastal resources from the threats of oil

138. See *id.* at 10-14. The approach taken by Rhode Island was modeled in large part on existing oil spill laws in other states, specifically Washington, Wisconsin, Alaska, and California. See Robert E. Falvey, *A Shot Across the Bow: Rhode Island's Oil Spill Pollution Prevention and Control Act*, 2 ROGER WILLIAMS U. L. REV. 363, 390-399 (1997), in which the author compares the provisions of Rhode Island's 1996 oil spill legislation to the Best Achievable Protection Standards, Washington's oil spill prevention regulations. WASH. ADMIN. CODE § 317-21-020 (1995).

139. See RHODE ISLAND SPECIAL SENATE COMM'N, *supra* note 88, at 1-15.

140. See *id.* at 8.

141. See *id.* at 9-10. The precedents cited in the Final Report include *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. 299 (1811); *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1 (1937); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Askew v. American Waterways Operators*, 411 U.S. 325 (1973); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); and *Chevron U.S.A. v. Hammond*, 726 F.2d. 483 (1984).

142. RHODE ISLAND SPECIAL SENATE COMM'N, *supra* note 88, at 10-14. See *supra* note 138, regarding the relationship between the components of the Rhode Island oil spill bill and other state statutes.

pollution until effective national standards for vessel-source spill prevention are enacted.¹⁴³

2. *Components of the Rhode Island Legislative Package*

The legislative package produced in response to the *North Cape* oil spill included four pieces of legislation. Two of the bills were memorializations to U.S. Congress, the first regarding reclassification of Rhode Island coastal waters as offshore rather than inland,¹⁴⁴ and the second urging Congress to pass the Towing Vessel Safety Act of 1996.¹⁴⁵ The third bill would expand the allowable uses of the Rhode Island Oil Release Response Fund to provide relief benefits to individuals and industries severely impacted by an oil spill.¹⁴⁶ These amended uses of the Oil Release Response Fund would allow for immediate availability of funding for response efforts,¹⁴⁷ and would also fund the development of a Safety Committee for Narragansett Bay and Long Island Sound.¹⁴⁸ The newly expanded Fund, capped at \$100 million,¹⁴⁹ would be partially financed by a five cent per barrel tax on all petroleum products entering Rhode Island ports.¹⁵⁰

The Senate Commission leadership characterized these first three initiatives as integral components of the comprehensive oil spill prevention strategy designed by the state.¹⁵¹ However, the fourth bill drafted by the Special Commission, The Oil Spill Pollution Prevention and Control Act, was by far the most aggressive and controversial proposal. This bill contained equipment and manning requirements which exceeded current federal standards, and these provisions ignited major controversy regarding the appropriate role of state legislation in oil pollution prevention.¹⁵²

143. *See id* at 14.

144. S.J. 96-S 3300, Jan. Sess. (RI 1996).

145. S.J. 96-S 3301, Jan. Sess. (RI 1996) (Introduced by Rhode Island Congressmen Jack Reed and Patrick Kennedy, this bill was ultimately absorbed by the Chafee amendments to the Oil Pollution Act.).

146. S.J. 96-S 3299, Jan. Sess. (RI 1996). *See also* RHODE ISLAND SPECIAL SENATE COMM'N, *supra* note 88, at 14.

147. R.I. GEN. LAWS § 46-12.7-5.1 (1) (1996).

148. *Id.* at § 46-12.7-13(2) (1996).

149. *Id.* at § 46-12.7-4.1(5) (1996).

150. *Id.* at § 46-12.7-4.1(4) (1996).

151. RHODE ISLAND SPECIAL SENATE COMM'N, *supra* note 88, at 6.

152. *See generally* Falvey, *supra* note 138, at 366, in which the author characterizes the

3. *The Rhode Island Oil Spill Pollution Prevention and Control Act*¹⁵³

On August 9, 1996, Rhode Island Governor Lincoln Almond signed into law the Oil Spill Pollution Prevention and Control Act (OSPPCA). The Governor sat at a folding table on Moonstone Beach, near the site where less than eight months earlier the *North Cape* lay grounded and leaking oil.¹⁵⁴ The Governor characterized the new legislation as aggressive in that this law provided tougher safety criteria for the tug and barge industry than those contained in federal law.¹⁵⁵ The enactment of the OSPPCA was hailed by the Governor as an example for other New England states to follow.¹⁵⁶ Although all individuals in attendance at the signing ceremony offered strong support for the new Rhode Island law, certain provisions were publicly criticized by the American Waterways Operators (AWO), an organization representing the coastal tug and barge industry. Even RIDEM indicated, in the months following the signing, that they considered certain provisions of the OSPPCA to be flawed and inappropriate.¹⁵⁷

Rhode Island legislative response to the *North Cape* oil spill as a "constitutionally indefensible, albeit well-intentioned, exercise of Rhode Island's police power." See also Elise E. Golden & Louise M. Kane, *Rhode Island's Legislative Response to the North Cape Oil Spill: The Expanding Role of State Government in Oil Pollution Prevention*, COASTAL ZONE 97, Abstracts of Presentations 272 (1996) in which the authors discuss the Rhode Island OSPPCA as a just expression of state regulatory authority and a continuation of a trend begun in other states.

153. R.I. GEN. LAWS § 46-12.5.1-1 *et seq.* (1996).

154. The signing ceremony was attended by Senators DiSandro and Fogarty, the bills' two primary supporters, as well as Curt Spaulding, Executive Director of Save the Bay; Tim Keeney, Director of the Department of Environmental Management; and Dennis Nixon, Professor of Marine Affairs at the University of Rhode Island and one of the bill's most vocal supporters. See Christopher Rowland, *Drawing a Line in the Sand: Rhode Island Toughens Oil-Barge Rules*, PROVIDENCE J.-BULL., Aug. 10, 1996, at A1.

155. *Id.*

156. *Id.* The signing ceremony, which was well-publicized and was well-attended by members of the Special Senate Commission and the Department of Environmental Management, did not betray the fact that the OSPPCA had been highly divisive and controversial as it moved through the Rhode Island General Assembly, and came very close to dying in the House of Representatives. Christopher Rowland, *House Approves Petroleum Barge Safety Regulations*, PROVIDENCE J.-BULL., July 18, 1996, at B4.

157. See Peter Lord, *Task Force Set Up to Look at Barge Safety*, PROVIDENCE J.-BULL., June 7, 1996, at B1. Before the Rhode Island legislation was enacted, AWO, in cooperation with the Coast Guard, had organized a task force to examine towing vessel and tank barge safety issues. One of the driving factors behind the formation of this group was the desire, on the part of the industry, the Coast Guard, and the RIDEM, to develop tug and barge safety

a. *The Intended Function of the OSPPCA*

The Rhode Island Oil Spill Pollution Prevention and Control Act was designed as a comprehensive strategy to prevent oil spills by requiring basic safety equipment and operational standards aboard towing vessels and tank barges operating in Rhode Island waters. Media accounts based on the comments of the American Waterways Operators and others who opposed Rhode Island's aggressive new law characterized these efforts as "knee-jerk" reactions to the *North Cape* spill,¹⁵⁸ more punitive than preventative in nature. However, the intent of the Senate Commission was to develop a broadly based oil spill prevention strategy which would supplement current federal regulatory standards. While the *North Cape* spill served as the focusing event which spurred public support for state legislative action, the OSPPCA was designed to be more than a targeted reaction to one specific pollution event.¹⁵⁹

The Rhode Island OSPPCA began by creating a state-level event reporting requirement, which mandated that all vessel owners or operators notify the RIDEM in the event of any collision, allision, grounding, or discharge of oil occurring while a vessel transits state waters.¹⁶⁰ The Act established personnel policies for vessels operating in state waters, including drug and alcohol use prohibitions, and provisions for random testing of crewmembers for drug and alcohol use.¹⁶¹ The Act also contained record-keeping provisions, which required maintenance of personnel training and shipboard drill records aboard all vessels operating in state waters.¹⁶²

The OSPPCA mandated certain operating procedures for vessels transiting state waters. These included navigational watch practices,¹⁶³ the preparation of voyage plans,¹⁶⁴ and technology requirements mandating certain equipment such as functional radar and global positioning systems

measures which were more acceptable to the industry and the Coast Guard than the Rhode Island OSPPCA.

158. See Tom Mooney, *Panel Proposes Stiffer Barge Rules*, PROVIDENCE J.-BULL., Feb. 17, 1996, at A1.

159. RHODE ISLAND SPECIAL SENATE COMM'N, *supra* note 88, at 16.

160. R.I. GEN. LAWS § 46-12.5-5 (1996) (*repealed* by P.L. 1997, ch. 32, § 1, effective June 30, 1997).

161. *Id.* § 46-12.5-18 (*repealed* by P.L. 1997, ch. 32, § 1, effective June 30, 1997).

162. *Id.* § 46-12.5-19 (*repealed* by P.L. 1997, ch. 32, § 1, effective June 30, 1997).

163. *Id.* § 46-12.5-21 (*repealed* by P.L. 1997, ch. 32, § 1, effective June 30, 1997).

164. *Id.* § 46-12.5-22 (*repealed* by P.L. 1997, ch. 32, § 1, effective June 30, 1997).

for all towing vessels operating in state waters.¹⁶⁵ The Rhode Island OSPPCA also created the Narragansett Bay/Rhode Island Sound Safety Committee.¹⁶⁶

b. Industry Criticism of the OSPPCA

Of all the components in the OSPPCA, there were four provisions which evoked the most serious protest from the tug and barge industry.¹⁶⁷ Indeed, these provisions set off a national debate regarding the delimitation of state and federal jurisdictional authorities over the maritime petroleum transportation industry.¹⁶⁸ The first of these provisions required that as of June 1, 1997, "no tank vessel shall transport oil or hazardous material on or over waters of the state in conditions of limited visibility" unless the tank vessel either possesses a double hull, or is accompanied by an escort tugboat.¹⁶⁹ The 1996 OSPPCA also mandated that as of January 1, 2001, all barges transporting oil through state waters in any weather conditions must be fitted with a double-hull, unless accompanied by a tug escort.¹⁷⁰ This requirement expedited the double-hull requirements for tank vessels transiting Rhode Island waters beyond the timetable established by that of

165. *Id.* § 46-12.5-23 (*repealed by* P.L. 1997, ch. 32, § 1, effective June 30, 1997).

166. R.I. GEN. LAWS § 46-12.5-25(5) (1996) (*repealed by* P.L. 1997, ch. 32, § 1, effective June 30, 1997). The Narragansett Bay/Rhode Island Sound Safety Committee is an advisory committee charged with planning for and overseeing the safe navigation and operation of tank vessels in state waters.

167. These protests were most often articulated by spokespeople for the American Waterways Operators. *See e.g.* Linda O'Leary, Vice President of Operations for American Waterways Operators, Statement before the Rhode Island Senate Committee on Judiciary, Providence, R.I. (May 28, 1996); Thomas Allegretti, President, American Waterways Operators, Comments to Marine Safety Council, U.S. Coast Guard, regarding Proposed Rulemaking for Navigation Safety Equipment for Towing Vessels, Coast Guard doc. no. 94-020 (1996).

168. The State of Washington was involved in a court challenge of its state-level oil spill prevention law during this time, and this case involved similar issues of preemption and state-level jurisdictional authority to enact oil spill prevention laws targeting vessel operations. *See International Ass'n of Indep. Tanker Owners (Intertanko) v. Lowry*, 947 F. Supp. 1484 (W.D. Wash. 1996).

169. R.I. GEN. LAWS § 46-12.5-24(a) (1996) (*repealed by* P.L. 1997, ch. 32, § 1, effective June 30, 1997). It is notable that nowhere in the law is the phrase "limited visibility" quantified or defined, and that this fact has been cited as potentially complicating implementation of the regulation by the state.

170. *Id.* § 46-12.5-24(b).

OPA.¹⁷¹

A second highly controversial component of the OSPPCA required that tank barges¹⁷² operating in Rhode Island state waters carry two crewmembers aboard the barge at all times.¹⁷³ One of the most contentious provisions of the Rhode Island act simply required that all tank barges operating in state waters have an operable anchor system which could be deployed by a crewmember in an emergency situation.¹⁷⁴ This requirement was so controversial among representatives of the tug and barge industry that they successfully lobbied to insert a clause which would allow tank barges to carry "another method of retrieving a lost tow"¹⁷⁵ as an alternative to the anchor requirement.¹⁷⁶ The final provision of the OSPPCA, which elicited strong industry protest, required all towing vessels transporting tank barges through state waters to have on board functioning automated fire and flood detection and suppression systems which could be activated by the master or crew in event of an emergency.¹⁷⁷

Despite the controversy surrounding the 1996 Rhode Island OSPPCA, only a few substantive changes were made to the legislation between May 5, 1996, when the bill was introduced into the Rhode Island Senate, and August 9, when it was signed into law by the governor.¹⁷⁸ However, certain

171. The Oil Pollution Act of 1990 establishes phase-in requirements for double hulls on tank vessels which would not require double hulls on tank barges in the same class as the *North Cape* until 2015. 46 U.S.C. § 3703(a) (1994).

172. The law only applies to those tank barges with capacity of greater than 7500 barrels of oil. R.I. GEN. LAWS § 46-12.5-21(d) (1996) (*repealed by* P.L. 1997, ch. 32, § 1, effective June 30, 1997).

173. *Id.* § 46-12.5-21(b)(ii). At the time the legislation was drafted, there existed no federal requirement for crewmembers aboard tank barges during normal operations. Approximately one month after the Rhode Island law was adopted, the Chafee Improvements to the Oil Pollution Act were signed into law by the President as part of the Coast Guard Authorization Act. These amendments to OPA require that tank barges carry either two crewmembers and an operable anchor or a barge retrieval device or comparable safety system. This new federal regulation still falls short of an actual crew requirement aboard barges.

174. R.I. GEN. LAWS § 46-12.5-23.2 (1996) (*repealed by* P.L. 1997, ch. 32, § 1, effective June 30, 1997).

175. *Id.* This provision was inserted into the law during final reconciliation of the bill between the House and Senate versions. The law contains no suggestions for "another method of retrieving a lost tow."

176. *Id.*

177. *Id.* at § 46-12.5-23.1(e). See Linda O'Leary, Vice President of American Waterways Operators, Statement before the Rhode Island Senate Committee on Judiciary, Providence, R.I. (1996).

178. Interview with Robert Bromley, Rhode Island Senate Deputy Policy Advisor (Aug.

provisions in the Rhode Island legislation were softened in response to industry concerns.¹⁷⁹ For example, the original draft of the bill offered no phase-in period for double hulls, but required double hulls or tug escorts for all tank vessels immediately upon enactment of the law, which was to be January 1, 1997. The Act was amended to push this date back to 2001. Likewise, criminal penalties for violation of requirements such as event reporting were included in the original bill, but were omitted from the version which was signed into law.¹⁸⁰ Despite these minor changes to the bill, the ultimate objective of the Special Senate Commission, to increase the safety standards which apply to tank vessels transiting Rhode Island waters, was still satisfied by the newly enacted law.¹⁸¹

4. *Formation of the Regional Risk Assessment Team*

Before the ink had dried on the 1996 Rhode Island oil spill bill,¹⁸² the oil industry had initiated efforts to avert legislative action in Rhode Island and other neighboring states.¹⁸³ Industry representatives repeatedly asserted, in media accounts and hearing testimony, that despite recent events the industry had an excellent safety record and that, in any event, vessel regulation was the exclusive realm of the federal government.¹⁸⁴ The

20, 1996). See also Christopher Rowland, *RI Toughens Oil-Barge Rules*, PROVIDENCE J.-BULL., Aug. 10, 1996, at A1.

179. The OSPPCA easily passed the Rhode Island Senate, where it enjoyed broad-based support from the Special Senate Commission as well as many members of the Senate leadership. However, in the House of Representatives, where the bill had fewer vocal supporters, industry representatives were more successful in their lobbying efforts, and came close to completely forestalling passage of the legislation. Instead, the AWO successfully convinced the House Committee which heard the bill to soften certain provisions and language in the bill. Interview with Robert Bromley, Rhode Island Senate Deputy Policy Advisor (Aug. 20, 1996).

180. *Id.*

181. Personal Communication with Robert Bromley (Aug. 20, 1996).

182. Rhode Island Oil Spill Pollution Prevention and Control Act, RI 96-S 3304 January Sess., 1996. This act was signed by Governor Lincoln Almond and passed into law on August 9, 1996. R.I. GEN. LAWS §§ 46-12.5-.09 to 12.5-5 and 12.5-18 to 12.5-25 (1996) (*repealed* by P.L. 1997, ch. 32, § 1, effective June 30, 1997).

183. See Dennis Nixon, *Letter to the Editor*, PROVIDENCE J.-BULL., July 10, 1996. The letter discusses the public relations barrage against the pending oil spill legislation. It notes the publication of Thomas Allegritti's (President of American Waterways Operators) July 10, 1996 letter to the Providence Journal-Bulletin and another AWO representative's article in the Maritime Reporter as evidence of the mounting attacks.

184 See e.g. Linda O'Leary, Vice President of Operations for American Waterways

American Waterway Operators argued that the industry should be trusted to self-regulate, and the organization hailed its Safe Carrier Program¹⁸⁵ as an example of the high safety standards that towing vessel and tank barge carriers could attain without statutory regulation.¹⁸⁶ Of course, the *North Cape* spill and other recent tug and barge casualties have demonstrated that industry self-regulation is probably not the most effective route to preventing future spills and casualties.¹⁸⁷ The swift progress of the OSPPCA

Operators, Statement before the Rhode Island Senate Committee on Judiciary, Providence, R.I. (May 28, 1996); Thomas Allegritti, President, American Waterways Operators, Comments to Marine Safety Council, U.S. Coast Guard, regarding Proposed Rulemaking for Navigation Safety Equipment for Towing Vessels, Coast Guard doc. no. 94-020 (1996).

185. The American Waterways Operators Responsible Carriers Program (1996) (on file with the *Ocean and Coastal Law Journal*). The American Waterways Operators is a national trade association for the coastal and inland barge and towing industry. AWO represents owners and operators of tugs and barges from New England to Alaska and throughout the interior river systems of the United States. The Responsible Carrier Program was formally adopted as a code of practice by the AWO in December, 1994. A target date of January 1, 1998 was set for bringing all members into compliance with the Program. The basic provisions of the program call for the safe and efficient operation of vessels by complementing and building on existing laws. The Program outlines towing vessel inspection guidelines, vessel maintenance standards, suggestions for navigation equipment, environmental controls, boat and barge rigging, tow and retrieval systems, firefighting and lifesaving equipment and manning, watchstanding and work hour regulations. Each of these practices is set forth in separate sections of the AWO Responsible Carrier Program Pamphlet. The oil industry has made tremendous strides in the prevention of careless spill events through education and safety campaigns directed at members of the petroleum transportation community. However, substituting well-intentioned, voluntary safety standards for statutory requirements in an industry with a dubious casualty history has been criticized by many as short-signed and irresponsible. This premise inspired the environmental community to resist the notion that self-regulation was a viable means of implementing industry-wide safety standards, and events such as the *North Cape* spill serve to illustrate the fact that there are at least a few operators who have chosen not to comply with voluntary safety programs such as the AWO Responsible Carriers Program. *Id.*

186. In fact, oil spill events due to tanker groundings or other marine casualties in the United States have decreased in the last five years, but those reductions in spills have occurred due to a number of factors. MARINE BOARD OF NAT'L RESEARCH COUNCIL, DOUBLE HULL TANKER LEGISLATION: AN ASSESSMENT OF THE OIL POLLUTION ACT OF 1990 144 (1998). Factors responsible include: increased awareness of financial responsibility, and state actions to increase and ensure transportation safety within state waters. Voluntary industry compliance for heightened safety is not cited as a factor of reduction in spill events. *Id.*

187. For example, Byline, *Nation In Brief*; Texas, *Same Barge Causes Second Oil Spill*, L.A. TIMES, May 28, 1996, at 9. Buffalo Marine Service Inc., operated two barges that dumped thousands of gallons of oil into the Houston Ship Channel and Galveston Bay. Both vessels had buckled causing the holding tanks to rupture. *Id.* Countless other spills have occurred from 1990-1997 in United State's waters, not to mention similar events outside

through the state legislature provided compelling evidence that the persistent protests of industry spokespeople were falling on deaf ears, at least in the State of Rhode Island.¹⁸⁸

By the summer of 1996, passage of the Rhode Island Oil Spill Act was imminent. Public sentiment continued to favor state-level action, and it appeared that the Rhode Island proposal would survive the considerable resistance of the industry, the U.S. Coast Guard, and even the Rhode Island Department of Environmental Management (RIDEM).¹⁸⁹ Other New England states had also begun to express publicly the intention to legislate in kind with Rhode Island, thus presenting the possibility that double hull, manning, anchoring and other tug and barge safety requirements could be legislated throughout the territorial waters of the New England states.¹⁹⁰ Against this backdrop of impending legislative action, the American Waterways Operators, together with the U.S. Coast Guard First District Office and the Massachusetts Maritime Academy, organized a towing vessel and tank barge safety workshop in early June, 1996.¹⁹¹

U.S. waters including the tragic *Empress* spill, shortly after the *North Cape*. See Proceedings of the Tank Barge/Towing Vessel Safety Workshop, Massachusetts Maritime Academy, sponsored by the U.S. Coast Guard, Massachusetts Maritime Academy, American Waterways Operators and the Northeast States, tab 11 (June 5-6, 1996).

188. See, e.g., such as Elizabeth Abbot and Christopher Rowland, *North Cape Spill; Tugs, Barges Face Few Regulations*, PROVIDENCE J.-BULL., Jan. 28, 1996, at A1; Tom Mooney, *Three States Look for Ways to Stop Oil Spills*, PROVIDENCE J.-BULL., Mar. 11, 1996, at B1 (discussing the need for increased state-level regulations and characterizing the tug and barge industry as under-regulated and unsafe); Mooney, *supra* note 158.

189. The rationale behind industry resistance to the Rhode Island law has been discussed in the body of this paper, and stems from obvious concerns regarding the economics of retrofitting barges and the financial liability and negligence implications of stricter regulation. However, the Coast Guard also publicly renounced the efforts of Rhode Island to legislate in this area, on the basis that the area of vessel regulation was the exclusive realm of the U.S. Coast Guard. The resistance of RIDEM to the Rhode Island law was a bit more complicated, and was undoubtedly due in part to party politics in Rhode Island. See Tom Mooney, *Dozens Decry "Knee Jerk" Legislation on Oil Spills*, PROVIDENCE J.-BULL., Apr. 10, 1996, at A1.

190. *Id.*

191. The workshop was held before the Rhode Island legislation had been enacted. Although representatives of the Rhode Island Senate Fiscal and Policy Office were invited to attend the conference, the event was orchestrated by the AWO and Coast Guard, and panel members represented primarily industry interests. The topics of discussion at the workshop did not directly address the contents of the Rhode Island bill as such, however discussion topics mimicked the contents of the Rhode Island law very closely, including issues such as manning of tank barges, anchoring systems, and double hulls. Representatives of state governments from Massachusetts, Connecticut, New York, and Maine were all in attendance at the meeting. See Proceedings of the Tank Barge/Towing Vessel Safety Workshop,

The stated purpose of this conference was to identify effective safety measures which could be implemented within the tug and barge industry, and to "educate" state legislators from the New England states and New York about the "flaws" in legislative proposals such as the Rhode Island Oil Spill Act.¹⁹² Proponents of the Rhode Island legislation viewed the conference as an effort to derail public support for state-level regulatory reform by establishing a Quality Action Team which would attempt to substitute voluntary compliance with industry-supported safety standards for state-level regulatory mandates.¹⁹³

Approximately eighty-five percent of those in attendance at the workshop represented either the oil industry, the tug and barge industry, or the United States Coast Guard.¹⁹⁴ Not surprisingly, the recommendations developed by the group called primarily for additional study and discussion of all issues identified.¹⁹⁵ The outcome of the workshop was the creation of a Regional Risk Assessment Quality Action Team, composed of representatives of the Coast Guard, AWO, the environmental community, and state governments.¹⁹⁶ The Regional Risk Assessment Team (RRAT) was headed by a Steering Committee which included the Coast Guard, the American Waterways Operators (representing the tug and barge industry), RIDEM (representing state regulatory agencies), and Save the Bay (representing local environmental groups).¹⁹⁷

Although nothing in the charter for the Regional Risk Assessment Team specifically addressed the Rhode Island Oil Spill Act,¹⁹⁸ participants

Massachusetts Maritime Academy, sponsored by the U. S. Coast Guard, Massachusetts Maritime Academy, American Waterways Operators, and the Northeast States, tab 2, 3 (June 5-6 1996).

192. *Id.* at tab 2.

193. Interview with John Torgan, Narragansett Baykeeper for Save the Bay (June 5, 1996).

194. Proceedings, *supra* note 191, at tab 6.

195. Proceedings, *supra* note 191, at tab 18.

196. Lord, *supra* note 157.

197. The four individuals on the RRAT Steering Committee were Capt. Eric Williams III, from the First Coast Guard District Office in Boston, MA; Ms. Linda O'Leary, Vice President of the American Waterways Operators; Mr. John Torgan, Narragansett Baykeeper for Save the Bay in Providence, RI; and Mr. Stephen Morin, head of the Emergency Response Team for the Rhode Island Department of Environmental Management. *Supra* note 191 at tab 19.

198. According to its charter, the purpose of the RRAT was to: "identify the risks of petroleum transportation in the New England/New York area and institute mechanisms and derive measures to reduce those risks with a holistic approach that meets the needs of the industry, state governments, environmental concerns and the public." *Supra* note 191, at tab

in the process have expressed the opinion that the primary purpose of the RRAT was to develop recommendations for regional towing vessel/tank barge safety standards to be implemented in lieu of the Rhode Island oil spill legislation, and which would preclude the development of similar statutes in other New England states or New York.¹⁹⁹ A newspaper report which described the formation of the RRAT noted that, "it appeared clear that the Coast Guard and industry experts are finally acting on safety issues both because of the recent oil spills and their fears about the slew of new legislation that they feel may impose expensive and unnecessary rules."²⁰⁰

The RRAT began meeting in September, 1996 and met periodically throughout the fall.²⁰¹ The objective of these meetings was to develop a final report which would contain recommendations for safety standards to be implemented within the framework of a specially regulated navigation area (RNA).²⁰² The RNA would be created by a Coast Guard rule, and would impose regional safety standards, implemented and enforced by the Coast Guard, for all towing vessels and tank barges operating in New England/New York coastal waters.²⁰³ Industry and agency representatives participating in the RRAT indicated, both during meetings and in statements to the press, that the regulations developed by the RRAT and implemented through the RNA should replace the Rhode Island regulations, which by this time had been enacted as law.²⁰⁴

5. *An Overview of the Rhode Island Response*

Rhode Island's legislative response to the *North Cape* incident is an example of one state's determination to prevent vessel-source marine

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199. Interview with John Torgan, Narragansett Baykeeper for Save the Bay (Oct. 20, 1996).

200. Lord, *supra* note 157.

201. It is interesting to note that although the Regional Risk Assessment Team was formed at the June workshop, the Steering Committee did not commence with meetings until September 12, 1996, a few weeks after the Rhode Island legislation was signed into law. According to at least one member of the Steering Committee for the RRAT, this time delay was due to the fact that the contents of the Rhode Island legislation, as passed, were central to the agenda developed for the RRAT meetings. Interview with John Torgan, Narragansett Baykeeper for Save the Bay (Oct. 20, 1996).

202. *Id.*

203. *Id.*

204. See Lord, *supra* note 157.

pollution incidents within state waters. Mobilized by the spill, the state initiated an investigation into the causes of the tug and barge accident. The Special Senate Commission investigating the spill determined that the *North Cape* spill might have been prevented, had the vessels involved been required by law to take certain, basic safety precautions.²⁰⁵ The Commission members concluded that considerable gaps existed in the federal regulatory scheme governing the towing vessels and tank barges responsible for transporting billions of gallons of oil through coastal waters annually. The facts of the *North Cape* spill provided conclusive evidence of this fact and served to accentuate the need for the state to legislate within the window of opportunity and public support provided by this event.²⁰⁶

Inspired by the Rhode Island initiative, a "flurry of legislative activity" ensued in other New England States.²⁰⁷ During the 1996 legislative session, Connecticut²⁰⁸ and Massachusetts²⁰⁹ both introduced oil spill prevention

205. For example, more careful voyage planning might have precluded the vessel from ever leaving port. Likewise, the presence of a functional fire detection and suppression system aboard the tug, coupled with a deployable anchor system on the barge, could have interrupted the chain of events which led to the spill. See previous textual discussion of the spill scenario. See also RHODE ISLAND SPECIAL SENATE COMM'N, *supra* note 88, at 8-14.

206. Many of the requirements incorporated into the law, such as event reporting, shipboard drills and training procedures, etc. were included in the law not as a reaction to the circumstances surrounding the *North Cape* spill, but as a result of research conducted by Special Commission staff members.

207. Kristin Thomas, *Spill Response: Legislators Set Sights on Tank Barge Operators*, WORKBOAT, July/Aug., 1996, at 36.

208. The State of Connecticut General Assembly initially responded to the Rhode Island oil spill with an aggressive bill entitled "An Act Concerning Pilotage and Safety Requirements for Certain Tank Vessels, Conn. Senate Bill bill no. 365, February, 1996." This bill required that all tank barges transporting oil or petroleum liquids through state waters be equipped with a double hull and a "redundant working ground tackle," of sufficient quality to hold a fully-laden barge during a storm. The bill also required that all tank vessels operating in state waters be equipped with an emergency response positioning beacon which could transmit information regarding a vessel's position in case of a lost-barge emergency. In addition to these navigational aids, the Connecticut bill required that tugs and barges be equipped with fire suppression systems, and that no towing vessel or tank barge should refuse the assistance of another vessel if the towing vessel or tank barge was in distress and posed an imminent threat to the public health or safety due to the possibility of grounding, sinking, or spilling oil. The provisions of this bill are similar in focus to those of the Rhode Island OSPPCA, and are clearly related to the facts of the *North Cape* spill. The legislature did not enact this bill, but ultimately passed an initiative calling for the formation of a standing committee to evaluate the feasibility of developing state regulations for towing vessels and tank barges operating in state waters. Conn. Substitute Senate Bill No. 365 (1996).

209. The Massachusetts legislature responded to the *North Cape* spill with a bill entitled

bills targeting the coastal tug and tank barge industry.²¹⁰ In addition to these state proposals, three pieces of federal legislation were introduced into the U.S. Congress by Representatives and Senators from Rhode Island, seeking to strengthen federal regulations governing oil transportation. The impact of Rhode Island's legislative response to the *North Cape* oil spill soon would reach beyond the walls of the Rhode Island Statehouse.

B. The National Legislative Response

1. The "Reed-Kennedy" Bills

During the months following the spill, two proposals addressing tug and barge safety standards were introduced into the House of Representatives by Rhode Island's Congressional delegation.²¹¹ These so-called "Reed-Kennedy" bills, which included the Towing Vessel Safety Act of 1996²¹² and the Barge Safety Act of 1996 (BSA),²¹³ were characterized by Representative Kennedy as "an important first step in preventing accidents like the *North Cape* oil spill."²¹⁴

"An Act Establishing Safety Requirements for Tank Barges, H.B. No. 5938, 180th Gen. Ct. (Mass. 1996). The provisions of this bill are a clear reaction to the anchor, double hull and tank barge manning issues raised by the *North Cape* spill. Governor William R. Weld characterized the Massachusetts bill as "provid[ing] the coast and waters of Massachusetts with enhanced protection by requiring barges transporting petroleum and other hazardous materials to be manned and to have operating anchor systems." The Act read as follows:

Section 50 C. (a) A tank barge carrying oil or hazardous material in the waters of the commonwealth for the purpose of discharging or receiving a cargo of any bulk petroleum product in the commonwealth shall be:

- (1) equipped with an operable anchor system, including
 - (a) an anchor that is suitable for a seagoing barge;
 - (b) an anchor chain; and
 - (c) a windlass; and
- (2) manned.
 - (b) Subsection (a)(2) of this section shall not apply to a tank barge that is equipped with a double hull.

Id.

210. Mooney, Mar. 11, 1996, *supra* note 188.

211. Jack Reed and Patrick Kennedy were Rhode Island's members to the House of representatives and co-sponsored the above mentioned bills. Reed was subsequently elected to the U.S. Senate in November 1996.

212. H.R. 4982, 104th Cong. (1996).

213. H.R. 3014, 104th Cong. (1996).

214. Patrick J. Kennedy & Jack Reed, News release: Legislation Introduced to Establish

The Towing Vessel Safety Act of 1996 was not a new proposal. The 1996 version of this bill represented the third time that towing vessel safety legislation had been introduced into the U.S. Congress. Former Representative Gerry Studds, from neighboring Massachusetts, introduced bills in both 1993 and 1994²¹⁵ which would have increased safety requirements for towing vessels in U.S. waters. While the 1993 and 1994 bills were also introduced in response to tug and barge casualties in U.S. waters,²¹⁶ the heightened public attention focused on tug and barge operations in the wake of the *North Cape* spill²¹⁷ provided yet another opportunity to promote a stricter federal standard for towing vessel and tank barge safety.

In many respects, the Reed-Kennedy TVSA was identical to the version introduced in 1994. Both contained equipment and licensing requirements.²¹⁸ In addition, the 1996 TVSA contained expedited casualty reporting requirements which raised the maximum penalty for not reporting a marine casualty from \$1,000 to \$25,000.²¹⁹ The 1996 TVSA also directed the Secretary of Transportation to develop licensing requirements for masters and mates of towing vessels, and required that all tugboats have

Regulations for Safety, Licensing, Inspecting of Tugboats (Jan. 31, 1996).

215. Towing Vessel Navigational Safety Act of 1993, H.R. 3282, 103d Cong. (1993); Towing Vessel Navigational Safety Act of 1994, H.R. 4058, 103d Cong. (1994).

216. The 1993 initiative to introduce towing vessel safety legislation was a response to two recent tug and barge casualties. The first occurred when a towing vessel pushing a hopper barge in New Orleans, Louisiana, struck a bridge, causing the bridge to collapse and kill a pregnant woman. The second casualty involved an Amtrak train accident near Mobile, Alabama earlier that year where a towing vessel struck a railroad bridge. The bridge collapsed from the impact of the collision, and shortly thereafter an AMTRAK passenger train plunged off the bridge and into the water killing 47 people. After an unsuccessful attempt to pass the towing vessel safety legislation in 1993, Congressman Studds reintroduced similar legislation the following year. Again, the need for such legislation was punctuated by a January, 1994 oil spill which occurred off the coast of Puerto Rico where a barge broke away from its towing vessel twice during one tow, and ultimately grounded on a coral reef, spilling 750,000 gallons of heavy oil onto six miles of pristine Caribbean beaches. See *Complaint of Metlife Capital v. M/V Emily S.*, 132 F.3d 818 (1st Cir. 1997).

217. See generally Dennis W. Nixon, *Legislative Agenda-Building in the Wake of the North Cape Oil Spill: The Critical Role of Initial Media Accounts and Witness Testimony*, COASTAL ZONE 97, Abstracts of Presentations 266 (1996).

218. John Mulligan, *Reed, Kennedy Offer Bill Tightening Tugboat Rules*, PROVIDENCE J.-BULL., Feb. 1, 1996, at C3. The Reed-Kennedy Act, like the Studds legislation, required that towing vessels be equipped with navigational equipment such as a functioning radar, electronic position-fixing device, and a compass or swing meter. H.R. 4982, 104th Cong., § 2(f)(1)(C) (1996).

219. H.R. 4982, 104th Cong., § 3(b) (1996).

a licensed operator onboard.²²⁰ Finally, the TVSA mandated that the Coast Guard conduct inspections of towing vessels.²²¹ Such inspections are currently conducted by other members of the towing vessel industry.²²²

On March 5, 1996, Representatives Kennedy and Reed introduced a second bill into Congress which also responded to issues raised by the *North Cape* spill.²²³ The Barge Safety Act of 1996²²⁴ was intended to complement the provisions of the Towing Vessel Safety Act, by instituting safety measures for tank barges as well.²²⁵ This bill targeted barges that carry oil or hazardous materials through U.S. waters, requiring that all such vessels be equipped with an operable anchor system²²⁶ and be manned.²²⁷ The manning requirement in the BSA did not apply to double-hulled barges.²²⁸ In addition, the Act also directed the Secretary of Transportation to issue regulations regarding dimensions for anchoring equipment and training requirements for individuals manning tank barges.²²⁹

2. *The Oil Spill Prevention and Response Improvement Act*

Neither the Towing Vessel Safety Act nor the Barge Safety Act made it through Congress as individually written. Both bills were absorbed by the Oil Spill Prevention and Response Improvement Act,²³⁰ introduced by Senator Chafee, to amend the Oil Pollution Act of 1990. The Oil Spill Prevention and Response Improvement Act was, in turn, modified and then incorporated into the Coast Guard Authorization Act of 1996.²³¹

220. *Id.* § 6 (1996).

221. *Id.* § 7 (1996).

222. Class "societies," such as the American Bureau of Shipping (ABS), currently conduct inspections of towing vessels; however, the ABS and other vessel class societies are private organizations which conduct voluntary inspections, and which have no regulatory authority.

223. See Tom Mooney, *Precautionary Step: Reed, Kennedy Seek More Oil-Barge Controls*, *PROVIDENCE J.-BULL.*, Mar. 2, 1996, at A3.

224. H.R. 3014, 104th Cong. (1996).

225. Mooney, *supra* note 223 at A3.

226. H.R. 3014, 104th Cong., § 2(a)(1) (1996).

227. *Id.* at § 2(a)(2).

228. *Id.* at § 2(b).

229. *Id.* at § 2(c). It is interesting to note that the tank barge bill which was introduced in the Massachusetts legislature is identical in wording to the Barge Safety Act introduced into Congress by Kennedy and Reed.

230. S. 1730, 104th Cong. (1996).

231. *Id.*

Senator Chafee, Chairman of the Senate Committee on Environment and Public Works, was no stranger to marine pollution issues. In 1990, he stated:

Mr. President, with passage of the Oil Pollution Act of 1990, the environment in which shippers of oil [operate] will change dramatically . . . I am very pleased that we are not waiting for another *World Prodigy*,²³² which next time . . . may occur in the midst of a winter storm, instead of on a sunny afternoon. This legislation will help us prevent and respond more effectively to oil spills and represents a major legislative achievement of this Congress.²³³

This statement, offered by Rhode Island Senator John Chafee in 1990 in support of the Oil Pollution Act, is wrought with ironies which the Senator could scarcely have imagined. Six and a half years after the *World Prodigy* spill, "in the midst of a winter storm," the State of Rhode Island did indeed experience a spill the size and impact of which has effectively eclipsed the *World Prodigy* event. Less than six years after Congress passed the Oil Pollution Act of 1990, the tank barge *North Cape* grounded within direct sight of Senator Chafee's Rhode Island summer home.

While oil spill response and planning professionals generally agree that OPA has improved the oil spill cleanup and response process in U.S. waters,²³⁴ the *North Cape* oil spill provided compelling evidence that the prevention standards established by the OPA have not precluded standard vessels from transporting significant quantities of oil or other hazardous substances along the U.S. coastline. The OPA has been specifically criticized for failing to regulate tank barges and towing vessels with the same vigor as it regulates oil tankers.²³⁵ In the months following the *North Cape* spill, environmentalists and residents of Rhode Island's coastal

232. On June 23, 1989, the Greek-flagged *T/V World Prodigy* hit Brenton Reef and spilled almost 300,000 gallons of home heating oil into the waters of Narragansett Bay, Rhode Island. The *World Prodigy* was one of three spills in U.S. waters which occurred during the same weekend in June, 1989. The cumulative effect of these three spills, which occurred within months of the *Exxon Valdez* spill, helped to maintain the momentum in Congress which ultimately led to the passage of OPA 90.

233. S. REP. NO. 101-136 at 11536 (1990).

234. See generally NATIONAL RESEARCH COUNCIL, DOUBLE HULL TANKER LEGISLATION: AN ASSESSMENT OF THE OIL POLLUTION ACT OF 1990 (1998).

235. Mooney, *supra* note 225, at A3.

communities²³⁶ repeatedly charged that OPA did virtually nothing to prevent this and other tank barge spills from occurring in U.S. waters.²³⁷

a. *Senator Chafee's Investigation*

In light of Senator Chafee's earlier remarks and the close proximity of the spill to his own summer property, it is not surprising that he began his own investigation, concurrent with the Rhode Island Senate legislative hearing process, into improving the federal Oil Pollution Act. On February 14, 1996, Senator Chafee held a field hearing of the U.S. Senate Committee on the Environment and Public Works in the Narragansett, RI, town hall,²³⁸ where Senator Chafee and his fellow Committee member Senator Joseph Lieberman, from nearby Connecticut, convened three panels of experts.²³⁹ Panel members represented the Coast Guard, the National Oceanic and Atmospheric Administration, the American Waterways Operators, the University of Rhode Island, Save the Bay, and the U.S. Fish and Wildlife Service, among others.²⁴⁰ Senator Chafee's mission in conducting this hearing was threefold: 1) to identify the causes of the *North Cape* oil spill; 2) to improve the ability to prevent future oil spills; and, 3) to strengthen existing response policies.²⁴¹

Senator Chafee began the hearing emphasizing the connection between a healthy environment and a healthy economy.²⁴² He suggested that the committee seek to identify measures which would strengthen OPA and aid

236. During the months following the spill, Save the Bay, a non-profit environmental group in Rhode Island with a membership of approximately 20,000 local citizens, held a series of public meetings to discuss the impacts of and response to the *North Cape* spill. Interview with John Torgan, Narragansett Baykeeper for Save the Bay (Feb. 14, 1996). Several concerned residents expressed the feeling that they did not believe current oil spill prevention laws and policies to be effective at preventing spills. *Id.*

237. Dennis Nixon, Formal Testimony before the Rhode Island Special Senate Commission investigating the North Cape Oil spill, Providence, RI, February 2, 1996. See RHODE ISLAND SPECIAL SENATE COMM'N, *supra* note 88.

238. Tom Mooney, *Community Grills Coast Guard Over Dely in New Safety Rules*, PROVIDENCE J.-BULL., Feb. 15, 1996, at B1.

239. *Id.*

240. Kolo Kerest, *Federal Hearing in Narragansett Seeks Answers From Oil Spill*, BLOCK ISLAND TIMES, Feb. 17, 1996, at A7.

241. *Oil Spill Prevention and Response Improvement Act: Hearings on 1730 Before the Senate Comm. on Env't and Pub. Works*, 104th Cong. 1-4 (1996) (statement of Hon. John Chafee, U.S. Senator from the State of Rhode Island).

242. *Id.*

in the prevention of future spills.²⁴³ Representative Jack Reed, also in attendance, remarked that the *North Cape* spill had provided the Committee with an opportunity to assess the effectiveness of OPA that the Committee should take advantage of.²⁴⁴

Vice Admiral Arthur E. Henn, Vice Commandant of the United States Coast Guard, testified before the Senate Environmental and Public Works Committee regarding the rulemaking record of the U.S. Coast Guard.²⁴⁵ In an uncomfortable moment for the Vice Commandant, Senator Chafee asked the Admiral why the Coast Guard was almost five years late in implementing interim regulations²⁴⁶ for single-hulled tank vessels.²⁴⁷ The Vice Commandant promised that a new rule for safety standards for uninspected towing vessels would be issued no later than the summer of 1996.²⁴⁸

The need for improvement in federal oil spill prevention policy was a theme that recurred throughout the February field hearing.²⁴⁹ Additional hearings were held in Washington, D.C. during the following months, where testimony focused specific measures to improve OPA.²⁵⁰ Collectively, these hearings resulted in the introduction of the Oil Spill Prevention and Response Improvement Act, which directly addressed many of the issues brought to light by the *North Cape* spill by attempting to supplement the federal regulations governing towing vessels and tank barges.²⁵¹

b. The Specifics of OSPRIA

The purpose of the Oil Spill Prevention and Response Improvement Act,²⁵² as originally drafted, was to amend the Oil Pollution Act of 1990 to

243. *Id.*

244. *Oil Spill Prevention and Response Improvement Act: Hearings on 1730 Before the Senate Comm. on Env't and Pub. Works*, 104th Cong. 4-6 (1996) (statement of Hon. Jack Reed, U.S. Representative from State of Rhode Island).

245. Kerest, *supra* note 240.

246. Mooney, *supra* note 238. OPA directed the Coast Guard to develop interim safety measures for oil-carrying vessels by August, 1991. *Id.*

247. *Id.*

248. *Id.* A final rule on navigational safety equipment for towing vessels was issued on July 3, 1996. 14.2(a) codified at 33 C.F.R. § 164.70-.82 (1997). However, the Coast Guard has not issued any rules, to date, on structural measures for improving towing vessel safety.

249. Mooney, *supra* note 238.

250. Patrick Crow, *Spill Response*, 94 OIL & GAS J. 33 (1996).

251. S. 1730, 104th Cong. (1996).

252. *Id.*

enhance prevention and improve response to oil spills and to ensure that citizens and communities affected by an oil spill receive prompt and full compensation.²⁵³ The Improvement Act was organized into two titles; the first addressed oil spill prevention measures,²⁵⁴ and the second focused on improving oil spill response capabilities.²⁵⁵ This first title is relevant to federal regulation of oil transportation.

Section 101 of Title I included interim safety measures for single-hull tank vessels which are in excess of 5,000 gross tons, and concentrated on ensuring a timely implementation of final operational and structural rules.²⁵⁶ It set deadlines of July 18, 1996 for the issuance of a final operational rule, and December 18, 1996, for the issuance of a final structural rule for single-hulled vessels.²⁵⁷ The language in S.1730 stated that if the Secretary of Transportation did not issue these final rules within the deadlines, the proposed rules for each of these measures would automatically go into effect.²⁵⁸ This automatic trigger for the implementation of proposed rules was an incentive to the Coast Guard to develop final rules by the established deadlines.²⁵⁹

Title I of S.1730 also required single-hulled tank vessels to have either a crew member and operable anchor on board the vessel or to have an emergency barge retrieval system or some "other measure" providing "comparable protection."²⁶⁰ While this ambiguous language was weaker than the manning and anchor requirements found in the Rhode Island law, it did address the issue of crew and anchors aboard single-hulled tank vessels.²⁶¹ Finally, the Oil Spill Prevention and Response Improvement Act directed the Secretary of Transportation to consider, in issuing rules, not only those measures which are determined to be cost-effective, but also

253. Telephone interview with Steve Odell, General Counsel for U.S. Senate Committee on Environment and Public Works (May 24, 1996).

254. S. 1730 at Title I.

255. *Id.* at Title II.

256. *Id.* § 101.

257. *Id.* The deadline for operational measures has been satisfied, at least in part, with the issuance of the Final Rule on navigational safety equipment for towing vessels issued July 3, 1996. Codified at 33 C.F.R. § 164.70-.82 (1997).

258. S. 1730, § 101(a).

259. Telephone interview with Steve Odell, General Counsel for U.S. Senate Committee on Environment and Public Works (May 24, 1996).

260. S. 1730, § 101(b).

261. Telephone interview with Steve Odell, General Counsel for U.S. Senate Committee on Environment and Public Works (May 24, 1996). Prior to the Improvement Act, there existed no federal standards for crew and anchors on barges.

measures which protect human safety, prevent collisions, and reduce oil outflow after a collision has occurred.²⁶² This directive showcases the Congressional intent that the Coast Guard not base future tug and barge safety rulemakings solely on economic feasibility.²⁶³

Section 102 of Title I of the OSPRIA created an incentive for shippers to convert to double-hulled vessels.²⁶⁴ The environmental protection community responded favorably to this provision because it attempted to accelerate the phase-in process for double hulls by providing liability incentives for operators of double-hulled vessels.²⁶⁵ The OSPRIA addressed towing vessel safety issues by requiring the Secretary of Transportation to issue a final rule for interim safety measures for uninspected towing vessels by September 30, 1996, and directing the Secretary to consider requirements for fire-suppression equipment when drafting that rule.²⁶⁶ Finally, the Chafee amendments called for additional studies and research by the Secretary of Transportation and the Army Corps of Engineers.²⁶⁷

262. S. 1730, § 101(b).

263. Telephone interview with Steve Odell, General Counsel for U.S. Senate Committee on Environment and Public Works (May 24, 1996). The Coast Guard is often criticized for tending to weight economic considerations of the impact of proposed rules on the oil transportation industry more heavily than environmental protection concerns. See Tammy A. Alcock, *Ecology Tankers and the Oil Pollution Act of 1990: A History of Efforts to Require Double Hulls on Oil Tankers*, 19 *ECOLOGY L.Q.* 97, 116-20 (1992).

264. S. 1730, § 102.

265. *Id.* Specifically, this section stated that shippers who operate double-hull vessels were not subject to liability above the cap unless they engage in gross negligence or willful misconduct. The liability cap cannot be pierced for operators of double hull tankers in cases of violation of applicable safety, construction, or operating requirements. *Id.* § 102 (1-2).

266. *Id.* § 103.

267. *Id.* § 104. Specifically, the bill calls for the Secretary to direct a study regarding the designation of shipping lanes for oil transportation as one method of reducing the risk of oil spills to the coastal environment. The Army Corps of Engineers was also directed by Congress to review the findings of a Rhode Island Commission studying the feasibility of dredging the Providence River Channel, in order to identify whether such dredging would reduce the level of tank barge traffic and thus reduce the threat of coastal oil spills in Rhode Island. For the duration of the Rhode Island legislative response to the *North Cape* spill, the dredging issue came up as a possible "solution." Proposals to dredge the Providence River channel have been fiercely debated in the State of Rhode Island for over two decades. Due to a high level of contamination in the sediments in Upper Narragansett Bay, the problems associated with siting these toxic dredge spoils has repeatedly slowed the progress of dredging projects. Proponents of dredging attempted to use the *North Cape* oil spill as further evidence of the need to dredge, citing as a reason the fact that petroleum products must come into Rhode Island via tug and barge because the channel depth is too shallow to allow navigation of tankers. However, this argument has been countered by many who assert

The provisions of the OSPRIA, though not as forceful as those in the Rhode Island law,²⁶⁸ would have filled in many of the "gaps" in federal law illuminated by the circumstances of the *North Cape* spill. Early drafts of the Chafee amendments were extremely aggressive; one such draft contained a provision which sped up the timetable for implementation of double hull requirements for every month that the Coast Guard lagged behind on issuing final rules for single-hulled vessels. Unfortunately, this and other aggressive components of the OSPRIA were absent from the version ultimately adopted by Congress.²⁶⁹ A significantly weakened version of the Chafee OPA amendments was signed into law by President Clinton in October of 1996 as part of the Coast Guard Authorization Act.²⁷⁰

3. *An Overview of the Federal Response*

The federal legislative response to the *North Cape* oil spill was initially quite impressive. Between the provisions of the Reed-Kennedy towing vessel and tank barge bills and the OPA improvements drafted by Senator Chafee, many of the concerns of the Rhode Island legislature were addressed at the federal level. Had all three bills been adopted in their original forms, towing vessels transiting all territorial waters, including Rhode Island's, would be required to carry on board basic navigational equipment as well as functional fire suppression equipment. Likewise, adoption of the Barge Safety Act would have ensured that all tank barges either carried crew aboard, or were equipped with double hulls, and that all tank barges would carry operable anchors. Finally, the Chafee amendments, as originally drafted, would have compelled the Coast Guard to speed up the rulemaking process for interim safety measures for single-hulled barges.

Unfortunately, rather than enacting each of the three bills as such, and thus creating a greatly strengthened federal standard for vessel-source oil

that oil is transported along the Northeastern coast by tug and barge for purely economic reasons, because they are cheaper to operate than tankers, and regardless of whether the Upper Narragansett Bay is dredged to accommodate tankers, tug and barges will continue to dominate oil transportation in the Northeast. See Mooney, Feb. 3, 1996, *supra* note 35.

268. For example, manning and anchor requirements in S. 1730 were weaker than the Rhode Island OSPPCA, and S. 1730 offered incentives for double hull implementation, but did not provide for a speed up of phase-in periods, as did the Rhode Island law.

269. Telephone interview with Steve Odell, General Counsel for U.S. Senate Committee on Environment and Public Works (May 24, 1996).

270. S. 1004, 104th Cong. (1996).

spill prevention, these bills were fused and incorporated into the Coast Guard Authorization Act of 1996. During this process, significant prevention measures in each bill were removed.²⁷¹ The oil spill prevention policies ultimately incorporated into the Coast Guard Authorization Act of 1996 were, in reality, quite minimal.

As Senator Chafee announced the adoption of the oil spill prevention improvement measures in the Coast Guard Authorization Act, he stressed that when Congress enacted OPA, they instructed the Coast Guard to issue rules that would increase the level of safety on the single-hulled barges that would continue to transit U.S. waters until their phase-out in 2015.²⁷² He stressed his expectation that the Coast Guard honor its commitment to meet the implementation deadline for these interim safety measures by December of 1996.²⁷³ Chafee also implied that while he realized the economic implications of accelerating the double hull implementation schedule, he still considered double hulls to be the preferred mechanism for preventing vessel-source oil spills.²⁷⁴ He stated that:

[O]n the prevention side . . . OPA can, and should, be strengthened so that we can avoid having to respond to an oil spill at all. The recent spills have only served to underscore the need for more effective prevention measures Although the best way to prevent spills from vessels is to equip them with double hulls, it is quite expensive to build a new double-hull vessel or to retrofit a single hull vessel with a second hull.²⁷⁵

The Coast Guard Authorization Act (CGAA) included two major oil spill prevention measures, borrowed from the Reed-Kennedy Bills and the OSPRIA. The CGAA required that all tank vessels operating in U.S. waters be equipped with either an operable anchor and a crew to deploy it,²⁷⁶ or an emergency retrieval system with no crew aboard the barge,²⁷⁷ or a "comparable measure" to protect against grounding of the barge.²⁷⁸ This

271. Telephone interview with Steve Odell, General Counsel for U.S. Senate Committee on Environment and Public Works (May 24, 1996).

272. 137 CONG. REC. S11795 (daily ed. Sept. 28 1996) (statement of Sen. Chafee).

273. *Id.*

274. *Id.*

275. *Id.*

276. S. 1004, § 901(a)(1).

277. S. 1004, § 901(a)(2).

278. S. 1004, § 902(a)(3).

language with its allowance for "comparable measures" was certainly weaker than the manning and anchor requirements in the Rhode Island legislation²⁷⁹ The CGAA also directed that "[t]he Secretary [of Transportation] shall require . . . the use of a fire suppression system or other measures to provide adequate assistance so that a fire on board a towing vessel that is towing a non-self-propelled tank vessel can be suppressed under reasonably foreseeable circumstances."²⁸⁰ The federal legislative proposals drafted in response to the *North Cape* oil spill were effectively reduced from double-hull incentives and manning requirements to a requirement for a fire suppression system and some method of barge retrieval. The enactment of the Coast Guard Authorization Act of 1996²⁸¹ took a relatively small step toward advancing the federal regulatory framework governing tank vessel- source oil spill prevention.

IV. THE OUTCOME OF THE *NORTH CAPE* SPILL

A. Federal-State Interaction

The purpose of the Environment and Public Works Committee hearings organized by Senator Chafee in the months following the *North Cape* spill was to develop measures to strengthen the federal Oil Pollution Act to address the concerns of his constituents in New England.²⁸² The Rhode Island Senate hearing process had highlighted the lack of federal regulations governing the coastal tug and barge industry as a major contributing factor to the causes of the *North Cape* spill. While the Rhode Island legislature proceeded with an attempt to supplement the federal regulatory scheme with stricter state law, Senator Chafee attempted to improve the federal oil spill law in order to eradicate the need for individual state action.

The Chafee amendments to the Oil Pollution Act and the Rhode Island Oil Spill Act moved through the U.S. Congress and Rhode Island General

279 Retrieval systems may often be as simple as an extra tow line trailing off a barge in a manner such that it may be accessed by another tug in an emergency situation. It is difficult to imagine how such a mechanism could be considered as effective as an anchor in slowing the progress of a runaway barge, especially since a retrieval device of any sort requires the presence of another vessel to employ.

280. S. 1004, § 902(f)(2).

281. S. 1004.

282. See preceding textual discussion.

Assembly simultaneously. As the Rhode Island OSPPCA moved through the General Assembly, members of the Rhode Island legislature closely monitored the contents and progress of the Chafee amendments, realizing that the fate of the federal bill would have a significant impact on the need for enactment of the Rhode Island law.²⁸³ The Rhode Island Oil Spill Act was enacted several weeks before the Chafee amendments to OPA, as incorporated in the CGAA, were signed into law by President Clinton. Although the OPA amendments originally drafted by Senator Chafee would have addressed many of the same issues as the Rhode Island Oil Spill Act, the anchoring and fire suppression provisions in the CGAA overlapped only minimally with the 1996 Rhode Island law.²⁸⁴ The enactment of these considerably weaker measures by U.S. Congress reinforced the sentiment among many in Rhode Island that state legislative action had indeed been the most effective course for adopting progressive oil spill prevention measures.²⁸⁵

In the intervening months between the *North Cape* spill and the enactment of Rhode Island's new oil spill act, the Coast Guard issued a long overdue final rule for navigational safety equipment on board towing vessels.²⁸⁶ This new rule also overlapped to some degree with the Rhode Island Oil Spill Act. Again, however, the Rhode Island law remained stricter in several respects than the new federal standard. For instance, the state law contained requirements for redundant compasses and VHF radios, and for both working radar and GPS.²⁸⁷ These requirements were more

283. Interview with Robert Bromley, Deputy Policy Advisor, Rhode Island Senate (Aug. 1996).

284. Although the CGAA and the Rhode Island law both contained manning, anchor, and fire suppression system requirements, the OPA 90 improvement provisions do not render the Rhode Island law completely redundant of federal standards. The fire suppression system requirement in the federal act did supplant the need for a similar provision at the state level, however the manning and anchor requirements in the Coast Guard Authorization Act were still weaker than those in the Rhode Island law. See S. 1004, § 901(a)(1)(2). In Rhode Island waters, all tank barges were now required to be manned with operable anchor systems, while the federal government still allowed for the operation of unmanned barges with no anchoring system, as long as they carried a retrieval device or "comparable measure." Furthermore, the OPA amendments contained no incentives for implementation of double-hulls, which is arguably the most effective spill prevention measure. See Alcock, *supra* note 264, for discussion of effectiveness of double hulls in preventing oil spills.

285. Interview with Robert Bromley, Deputy Policy Advisor, Rhode Island Senate (Aug. 1996).

286. 33 C.F.R. § 164 (1996).

287. R.I. GEN. LAWS § 46-12.5-23 (1996) (*repealed by* P.L. 1997, ch. 32, § 1, effective June 30, 1997).

comprehensive than the contents of the Coast Guard navigational equipment rule.²⁸⁸

While this stricter safety standard for tug and barge operations in Rhode Island state waters was generally applauded by environmentally concerned citizens, fishermen, and many in the Rhode Island legislature, other interests likewise persisted in their rejection of the Rhode Island Oil Spill Act as an unconstitutional expression of state authority.²⁸⁹ This issue remains open to wide interpretation. Proponents of the Rhode Island legislative response hailed it as a fair and just expression of the concurrent jurisdiction afforded to states by OPA.²⁹⁰ Despite the jurisdictional issues raised by its critics, the State of Rhode Island now boasted the strictest anti-oil pollution statute on the eastern seaboard, and held tug and barge operators to a stricter safety standard than the federal government.

Although the OSPPCA was often characterized as unconstitutional or inappropriate,²⁹¹ the Rhode Island Oil Spill Act has not been challenged in court. However, as the OSPPCA moved through the Rhode Island General Assembly, and even after the bill was enacted as law, U.S. Coast Guard and tug and barge industry representatives persisted in seeking out alternatives to implementation of the Act.²⁹² These attempts were criticized by environmentalists as subtle efforts to avoid increased regulation by invoking stall tactics such as advocating further study before instituting regulatory reform.²⁹³ One such effort involved the formation of a Regional Risk Assessment Team, to study the risks associated with petroleum transport along the eastern seaboard. Ironically, the Risk Assessment Team findings became the platform from which an even stronger Rhode Island law was

288. There are other examples of where the Rhode Island law, and others like it on the West Coast are more stringent than federal standards, even with the recent amendments to OPA and the issuance of Coast Guard rules for towing vessels and single-hulled tank barges.

289. See generally Falvey, *supra* note 138.

290. See *supra* note 129 and accompanying text.

291. See Linda O'Leary, Vice President of Operations for American Waterways Operators, Statement before the Rhode Island Senate Committee on Judiciary, Providence, R.I. (May 28, 1996).

292. *Id.*

293. A generally accepted stall tactic, with many industry groups who are fighting increased regulation, is the call for additional research or study on an issue before regulations are adopted. Although research should certainly play a large role in all policy decision-making, environmentalists generally cite the fact that, with respect to such structural improvements as double hulls or anchoring requirements, industry representatives have historically called for more and more study. This tactic, as it pertains to double hulls, has continued for 25 years. See generally Alcock, *supra* note 264.

launched, and also contributed to a recent U.S. Coast Guard rulemaking implementing the contents of the Coast Guard Authorization Act.

B. RRAT Revisited

As previously discussed, the American Waterways Operators lobbied aggressively to convince Rhode Island state legislators to endorse the RRAT recommendations and to allow these industry-supported initiatives to replace the 1996 OSPPCA.²⁹⁴ Likewise, the RRAT Steering Committee planned to submit a final draft of their recommendations to state legislatures throughout New England in order to discourage other state governments from hastily implementing oil spill laws similar to Rhode Island's.²⁹⁵

However, RRAT participants from the New England state legislatures and environmental groups held a slightly different view regarding the RRAT recommendations. While these RRAT members continued to participate in and support the Regional Risk Assessment process, they held firm to the notion that the RRAT recommendations, implemented through the RNA, should not act as a substitute for state-level regulations, but that states should continue to legislate in a manner which would complement and further strengthen the regulatory framework developed through the RRAT.²⁹⁶ Mr. Phil Smith, Deputy Director of the Massachusetts Executive Office of Environmental Affairs, expressed this view in the following memorandum to the American Waterways Operators:

294. As unlikely as this may seem, Mr. Morin of the RIDEM had assured members of the Steering Committee that Rhode Island would indeed sign off on the RRAT recommendations and accept them as a replacement for the new state law. Interview with John Torgan, Narragansett Baykeeper for Save the Bay (Oct. 20, 1996).

295. Memoranda from Phil Smith, Deputy Director of the Commonwealth of Massachusetts Executive Office of Environmental Affairs, to Linda O'Leary, American Waterways Operators, at 1, 2 (May 13, 1997).

296. Implementation of an RNA would require federal rulemaking, a process which generally requires at least one year from the time a proposed rule is issued to the time a final rule is developed. Although RNA's exist throughout U.S. waters, they are generally very small and specific in nature. The implementation of an RNA throughout the first district for as broad a purpose as oil spill prevention would be a first, and members of the environmental community have expressed concern regarding enforceability and likelihood of timely implementation. See SARAH CHASIS AND NINA SAMKOVITCH, COMMENTS OF THE NATURAL RESOURCES DEFENSE COUNCIL ON THE SECOND DRAFT OF THE REGIONAL RISK ASSESSMENT TEAM'S FINAL REPORT, Submitted to the U.S. Coast Guard First District Office (Jan. 15, 1997).

It appears . . . that perhaps you have misunderstood the distinction between the Massachusetts legislative initiative and the Regional Risk Assessment Team (RRAT) report and recommendations . . . as was repeatedly made clear . . . during the deliberations, the most critical aspect of the RRAT's recommendations is the federal rulemaking. Absent adoption of those recommendations the RRAT is destined to become just another report to put on the bookshelf similar to previous reports. . . . To date Massachusetts has seen no indication . . . the RRAT's recommendations will be implemented by October 1, 1997. The demonstrated failure to meet previous regulatory deadlines specified by the Oil Pollution Act of 1990 does not inspire confidence that the latest deadline will be any different.²⁹⁷

1. *The RRAT Report and Recommendations*

Despite the undercurrent of disagreement and debate among RRAT participants, the Team produced a final report at the end of December, 1996.²⁹⁸ As promised, the report included recommendations for safety standards to be implemented within a specially regulated navigation area (RNA) for New England coastal waters and to be enforced by the U.S. Coast Guard.²⁹⁹ The RRAT report addressed all of the major tug and barge safety provisions present in the Rhode Island OSPPCA, offering specific recommendations on each issue.³⁰⁰ The report also considered operational safety and equipment standards which had not been addressed in the state law.³⁰¹ Two of the major issues addressed in both the RRAT report and the OSPPCA were tank barge crew requirements and barge anchoring and retrieval systems. The RRAT concluded that since tank barges are subject to Coast Guard inspection, they cannot be required to be manned unless the Coast Guard inspector determines manning to be necessary for the protection of life, property, or the safe operation of the vessel.³⁰² The team

297. Memoranda from Phil Smith, Deputy Director of the Commonwealth of Massachusetts Executive Office of Environmental Affairs, to Linda O'Leary, American Waterways Operators, at 1, 2 (May 13, 1997).

298. UNITED STATES COAST GUARD REG'L RISK ASSESSMENT TEAM, EXECUTIVE SUMMARY RECOMMENDATIONS ON VESSEL OPERATIONS AND RISK REDUCTIONS (Dec. 1996).

299. *Id.*

300. *Id.*

301. *Id.*

302. Interestingly, the Team found that a large percentage of barges operating in the

identified and offered alternative practices and technologies that they felt would offer equivalent protections to manning, including the requirement for operable anchors and barge retrieval systems.³⁰³ The RRAT recommended an anchoring and barge retrieval requirement similar to that in the CGAA,³⁰⁴ and the Team also determined that different anchoring requirements should apply depending on whether a barge is manned.³⁰⁵

The RRAT report also addressed voyage planning, and the RRAT recommendations on this issue were virtually identical to the provisions in the Rhode Island Act.³⁰⁶ Both recommended that all barge companies prepare comprehensive voyage plans prior to transit of New England waters, including information on weather, vessel equipment, and communication and navigation requirements.³⁰⁷ The RRAT report also followed the State of Rhode Island's lead on the issues of navigational safety equipment aboard towing vessels.³⁰⁸ The RRAT advocated adoption and more

Northeast waters were already manned. The RRAT report acknowledged that approximately 70% of tank barges operating in the Northeast were currently operated with crew on board. Approximately 10-15% of other barges were determined to be notched barges (barges attached to the tow in a notch where the tow pushes the barge and a crew member can easily board) or a tow/barge configuration at the hip where likewise a crew member can easily board in an emergency. The remaining 5-10% of unmanned barges should be subject to enhanced requirements for anchoring and barge retrieval systems as recommended later in the report. The enhanced anchoring and retrieval regulations recommended consisted of unmanned barges having an operable anchor system and a barge retrieval device with pickup capability on the tug. See UNITED STATES COAST GUARD REG'L RISK ASSESSMENT TEAM, *supra* note 300. Supporters of the Rhode Island legislation had consistently argued that requiring safety measures (such as manned barges) that were already existing in most instances was not unduly burdensome.

303. *Id.*

304. See previous textual discussion of the oil spill prevention components of the 1996 Coast Guard Authorization Act.

305. It was recommended that manned barges have an operable anchor system on the barge and some means of retrieving a lost barge aboard the tug (for example, an extra tow line). For unmanned barges, the safety recommendations included an operable anchor aboard the barge as well as emergency retrieval devices on both the tug and barge. This extra level of safety on unmanned barges was meant to compensate for the fact that no crew would be aboard to deploy and anchor or catch a retrieval line.

306. R.I. GEN. LAWS § 46-12.5-22 (1996) (*repealed by* P.L. 1997, ch. 32, § 1, effective June 30, 1997). The 1996 Rhode Island law contained a comprehensive voyage plan that included information related to weather, vessel equipment, communication and navigation requirements.

307. See *id.* and UNITED STATES COAST GUARD REG'L RISK ASSESSMENT TEAM, *supra* note 298.

308. The 1996 Rhode Island law contained a requirement for fire suppression equipment and basic navigational equipment, such as compasses and GPS aboard towing vessels. The

extensive application of the Coast Guard final rule on navigation equipment,³⁰⁹ and it also recommended requiring Differential Global Positioning Systems on all towing vessels operating in Northeastern waters.³¹⁰

While many of the recommendations in the RRAT report mirrored the contents of the 1996 Rhode Island law, the Risk Assessment Team also made recommendations on operating procedures which were not addressed in the OSPPCA. These include procedures for enhanced communications aboard all commercial vessels traversing Long Island Sound or the territorial waters of the New England states,³¹¹ operational safety measures to reduce crew fatigue and human error,³¹² and lightering procedures for

fact that the *North Cape* spill resulted from an engine fire on the tug was the primary reason for including a fire suppression system requirement in the R.I. law. See R.I. GEN. LAWS § 46-12.5-22 (*repealed by* P.L. 1997, ch. 32, § 1, effective June 30, 1997).

309. See 33 C.F.R. 164 (1996).

310. See UNITED STATES COAST GUARD REGIONAL RISK ASSESSMENT TEAM, *supra* note 298, explaining the new Coast Guard rule which established navigation equipment requirements for towing vessels, published in the *Federal Register*, July 3 1996. The rule requires all vessels over 39.4 feet or 12 meters in length to have on board certain equipment appropriate for their specific geographic regions of operation. Equipment required to be on board includes marine radar equipment meeting the Federal Communications Commission and Radio Technical Commissions for Maritime Services requirements; at least one VHF radio as required by the Bridge-to-Bridge Radiotelephone Act; a searchlight capable of illuminating objects at a distance of twice the length of the tow; current navigation charts; magnetic compasses, a fathometer and for ocean going vessels an electronic fixing device such as a LORAN C or Global Positioning System (GPS) receiver. The rule also established regulations for the selection, inspection, and maintenance of tow lines and terminal gear. Also regulated are basic crew requirements for navigation underway including the assurance that crew or operators are knowledgeable in the use of navigation equipment on board. It also sets requirements for equipment inspections to be performed prior to a voyage longer than twenty-four hours in duration or when a new master or operator assumes control of the vessel. It is difficult to imagine that until this rule was published no Coast Guard requirements for tugs and tank barges such as compasses or navigation charts existed. See 33 C.F.R. § 164 (1996).

311. The RRAT recommended that all commercial vessels operating in those waters be required to establish and maintain communications on VHF channels 13 or 16 with other vessels traveling in the same geographic regions at certain identified reference points. See UNITED STATES COAST GUARD REG'L RISK ASSESSMENT TEAM, *supra* note 298.

312. The report called for operational safety measures which addressed the human factor in spill prevention. The RRAT advocated that several practices be adopted by the tug and barge industries operating in New England waters. These practices including familiarizing management with a recent study on the role of fatigue in trucking accidents and keeping them updated on new studies concerning the human factor in marine transportation accidents. The report also advocated mandatory human factors and fatigue awareness training for key personnel. See UNITED STATES COAST GUARD REG'L RISK ASSESSMENT TEAM, *supra* note 298.

vessels in coastal or harbor areas.³¹³ Likewise, the RRAT report suggested that certain environmentally sensitive areas be designated as exclusion zones for all tank barge traffic, and that tug operators adopt practices for increased security calls at the geographic regions specified within the enhanced communication section of the RRAT report.³¹⁴

The Regional Risk Assessment Team considered at length the issue of tug escorts for single-hulled vessels.³¹⁵ Industry representatives on the RRAT, who strongly opposed expedited double hull requirements and tug escort provisions in the Rhode Island law, maintained that a tugboat equipped with two engines and two screws (propellers)³¹⁶ would provide a comparable level of safety to tug escorts.³¹⁷ The report suggested that tug escorts should only be required for single-engine towing vessels with petroleum-laden barges.³¹⁸ On the issue of double hulls, the RRAT report maintained that any proposal to accelerate the retirement schedule for existing single-hulled vessels could disrupt the "existing petroleum transportation and distribution network in the New England states."³¹⁹ This position, however, was not supported by the environmental community, and comments on the RRAT report submitted by groups such as Save the Bay and the Natural Resources Defense Council generally supported acceleration of the double hull phase-in schedule in OPA 90.³²⁰

313. Lightering is the practice of unloading petroleum cargo from one vessel to another, generally to a smaller vessel for transport to shoreside facilities. Again, lightering is an issue which was not addressed in the 1996 Rhode Island law.

314. See UNITED STATES COAST GUARD REG'L RISK ASSESSMENT TEAM, *supra* note 298.

315. The 1996 Rhode Island law required that as of January 1, 2001, all single-hulled tank barges entering state waters must be accompanied by an escort tug. See R.I. GEN. LAWS § 46-12.5-24(b) (*repealed by* P.L. 1997, ch. 32, § 1, effective June 30, 1997).

316. A vessel with twin screws is generally more maneuverable than a vessel with a single screw.

317. However, the RRAT did recognize that in certain situations or geographic areas, single-screwed tugs could actually provide greater maneuverability. See UNITED STATES COAST GUARD REG'L RISK ASSESSMENT TEAM, *supra* note 298.

318. *Id.*

319. See *id.*

320. See comment letter from John B. Torgan, Co-Chair, RRAT Steering Committee for Environmental Organizations, to United States Coast Guard First District Office (Jan. 1997). See also CHASIS & SANKOVITCH, *supra* note 296.

C. Rhode Island Reconsiders: The 1997 Tank Vessel Safety Act

With the release of the RRAT final report, industry representatives on the RRAT began an intense lobbying campaign to encourage the State of Rhode Island to repeal the OSPPCA.³²¹ Concurrently, Save the Bay initiated their own efforts to circumvent a total repeal of the statute by lobbying the Rhode Island state legislature to keep the 1996 law intact and instead use the RRAT recommendations to supplement existing safety provisions.³²² Save the Bay articulated this position in their comments on the RRAT final report:

[These recommendations] should not be implemented in lieu of enforceable state laws. [The report] should, however, be regarded as complementary to existing state and federal laws. There are several reasons for this: . . . The federal rulemaking process allows for multiple opportunities for a proposed rule to be altered, delayed or dismissed, . . . the existing recommendations are subject to be changed at the Coast Guard's sole discretion . . . [and] [t]here is no reason why state statutes, such as the existing Rhode Island laws must be repealed in order to develop an RNA. . . . [I]t is our position that state oil spill prevention statutes and regulations are not preempted by federal law. Where they are necessary to protect our valuable and fragile marine resources, state laws are a legitimate and appropriate means of achieving elevated levels of protection.³²³

Despite these efforts, RRAT steering committee members continued to work towards a repeal of the statute. In the spring of 1997, the RIDEM drafted a replacement bill intended to repeal the 1996 law and submitted this bill to the Rhode Island legislature.³²⁴ The RIDEM bill would have replaced the tug escort, double hull, manning, anchoring, fire suppression, and other safety standards enacted in 1996 with significantly weakened

321. See personal Communication with John Torgan, Baykeeper for Save the Bay (Jan. 15, 1997).

322. *Id.*

323. See Torgan, *supra* note 320.

324. See Memoranda from John Torgan, Baykeeper for Save the Bay, to Rhode Island Senator Charles Fogarty (Mar. 18, 1997) at 1, (Mr. Torgan references the RIDEM's submission of 97-S 898 undertaken to repeal Rhode Island's General Laws 46-12.5 Chapter 290).

anchoring provisions and other fairly innocuous requirements, with an additional one year delay in implementation of these regulations.³²⁵

Save the Bay again spoke out in opposition to the RIDEM replacement bill:

As written, th[is] bill would substantially weaken oil spill protection for Rhode Island and offer no enforceable pollution prevention provisions. Therefore Save the Bay will strenuously oppose its passage as written. . . . RIDEM and industry representatives may argue that federal initiatives such as those contained in the RRAT, the Coast Guard Reauthorization Act of 1996, and the existing provisions of OPA 90 will provide equivalent protection to the Rhode Island statute. This is simply not true.³²⁶

At Save the Bay's request, Rhode Island's Senate leadership³²⁷ consented to several meetings designed to improve the existing OSPPCA statute in "a fair and prudent manner."³²⁸ At these meetings, Save the Bay presented its concerns and voiced objections to the RIDEM replacement bill.³²⁹ Based on these objections, a new bill was drafted to replace the RIDEM bill.

The 1997 Tank Vessel Safety Act³³⁰ repealed the 1996 OSPPCA, but unlike the RIDEM bill, combined elements of the 1996 Act with the RRAT recommendations. In areas where the 1996 Rhode Island law contained stronger protection measures than the RRAT recommendations, such as double hull and event reporting requirements as well as drug and alcohol policies, the 1997 Act retained the language from the original Rhode Island statute.³³¹ However, the 1997 Act adopted language similar to that in the RRAT report on issues such as voyage planning, manning, navigation

325. R.I. S-898 (1997).

326. Memoranda from John Torgan, Baykeeper for Save the Bay, to Charles Fogarty, Rhode Island Senator (Mar. 18, 1997) at 1.

327. Namely, Senator Charles Fogarty, who is a senior member of the Democratic majority and Chairman of the Rhode Island Senate Committee on Judiciary.

328. Telephone Interview by Louise Kane with John Torgan, Narragansett Baykeeper for Save the Bay ((Nov. 17, 1997).

329. See Torgan, *supra* note 326, at 1.

330. R.I. GEN. LAWS § 46-12.6-1 (1997). The Rhode Island Bill S-0898 was enacted in July of 1997. This Bill repealed the 1996 Oil Spill Prevention and Control Act in its entirety and was subsequently entitled the Tank Vessel Safety Act and placed under Title 46 of Rhode Island's General laws entitled "Waters and Navigation."

331. See R.I. GEN. LAWS § 46-12-6.4, § 46-12,6-5, § 46-12.8 (1997).

equipment, and tug escorts.³³² Finally, the 1997 Act added to the 1996 statute by including provisions for enhanced communications, lightering safety, and a Good Samaritan clause.³³³ In this way, the 1997 Act served both to strengthen existing tug and barge safety standards in Rhode Island waters, and perhaps more importantly, to demonstrate that the state was willing to acknowledge and accept many of the RRAT recommendations, but not to completely abandon the most aggressive components of the 1996 law.³³⁴

The 1997 Tank Vessel Safety Act was considered by Rhode Island legislators to be an improvement over the 1996 OSPPCA.³³⁵ Vague and potentially unenforceable terminology such as "limited visibility" was removed from the original law by the 1997 amendment.³³⁶ Likewise, other provisions were removed to prevent redundancy with provisions of federal law.³³⁷ Under the new Act, single-hulled tank barges were now required to be towed by tugs equipped with twin screws or engines, or if not, to use an escort tug.³³⁸ In addition to workable anchors for manned barges, the new Tank Vessel Safety Act also required redundant retrieval devices such as extra tow lines.³³⁹ In contrast to the 1996 law, the 1997 amendments allowed unmanned barges to transit state waters – but only when three barge-retrieval devices were easily accessible on board the unmanned barge.³⁴⁰ The Tank Vessel Act also included a Good Samaritan clause preventing or limiting liability, except in instances of gross negligence, for

332. *Id.* §§ 46-12.6-9, 10, 12.

333. The Good Samaritan provision limits liability for vessels and individuals who come to the aid of a barge or tank vessel in peril. *See id.* § 46-12.3-8 (1997).

334. The incorporation of RRAT recommendations into the Rhode Island state law also served the important purpose of demonstrating to the industry that the state was willing to abide by industry suggestions. One major criticism of the 1996 OSPPCA was that it was developed with very little industry input. This fact helps to explain why the law was treated with such hostility from many industry representatives. By amending the R.I. law to reflect industry input, Rhode Island legislators hoped to foster a more cooperative relationship between the tug and barge industry and state legislators. Interview with John Torgan, Narragansett Baykeeper (June 1997).

335. Jena L. Carter, Rhode Island Senate Brief, Tank Vessel Safety Act S-898 (May 22, 1997).

336. *Id.*

337. *Id.* The brief points out that the Chafee amendments to OPA adequately addressed fire suppression systems and thus were not included in the 1997 version.

338. R.I. GEN. LAWS § 46-12.6-8(3) (1997).

339. *Id.* § 46-23.6-9.

340. Unmanned barges were required to have on board a workable anchor, extra tow line, and a barge retrieval device with pick up capability. *Id.* § 46-12.6-9(b).

vessel operators and owners rendering assistance to oil tankers and barges in need of assistance.³⁴¹

Finally, the Tank Vessel Safety Act included a "lifting provision," allowing for the repeal of applicable sections of the Rhode Island law if and when the Coast Guard develops a rule or regulation comparable in strength and content to existing provisions in the state law.³⁴² This provision was intended to prevent redundancy or overlap between state and federal regulations in the event that the Coast Guard develops future rulemakings addressing issues such as manning of tank barges, tug escorts, or expedited double hull phase-in schedules.³⁴³ The inclusion of a lifting provision shows a certain measure of faith on the part of state legislators, indicating a recognition of federal regulatory authority in this area, and further indicating an expectation that the Coast Guard will continue to develop tug and barge safety rules and eventually eliminate the need for states to assume this role.

In June of 1997, the Rhode Island Tank Vessel Safety Act was signed into law.³⁴⁴ The enactment of these amendments to the highly controversial 1996 OSPPCA resolved many of the concerns regarding future industry attempts to block implementation of the 1996 law. In the State of Rhode Island, the legacy of the *North Cape* oil spill was a finely-tuned statute which addressed environmental concerns by building upon safety recommendations developed cooperatively with industry representatives.

D. Coast Guard Proposed Rule on Towing Vessel Safety

On October 6, 1997, the U.S. Coast Guard released a proposed rule for towing vessels and tank barges which, if adopted in its current form, could result in the preemption of at least two provisions in the Rhode Island Tank Vessel Safety Act.³⁴⁵ The proposed rule concerns the barge retrieval and anchoring requirements and the fire suppression system requirements mandated by the Coast Guard Authorization Act.³⁴⁶ In developing the

341. *Id.* § 46-12.3-8.

342. *Id.* § 46-12.6-12.

343. *Id.*

344. R.I. GEN. LAWS § 46-12.6-1 (1997).

345. 62 Fed. Reg. 52,060 (1997) (to be codified at 33 C.F.R. pt. 155, 46 C.F.R. pts. 25, 27, and 32) (proposed October 6, 1997).

346. The Coast Guard missed a Congressionally mandated deadline, as the Coast Guard Authorization Act of 1996 required the rule to be in *effect* by October 1, 1997.

proposed rule, the Coast Guard conducted an analysis of the operating conditions in the coastal and open ocean tug and barge industry,³⁴⁷ and also considered the recommendations of the RRAT and the Towing Safety Advisory Committee (TSAC).³⁴⁸

In many respects, the October 1997 rulemaking went beyond the specifications of the Coast Guard Authorization Act (CGAA). For example, the proposed rule extended the barge retrieval and anchoring provisions mandated by the CGAA to apply to both double and single hull vessels.³⁴⁹ The Coast Guard, acting on the advice of the TSAC, also addressed the element of prevention as it relates to barge separation and retrieval.³⁵⁰ As a complement to the barge retrieval and anchor provisions, TSAC recommended that the Coast Guard provide guidance on the issue of voyage planning by developing a Navigation and Vessel Inspection Circular (NVIC).³⁵¹ The Coast Guard had already developed a NVIC on tow wire maintenance, and the TSAC suggested that similar guidance on voyage planning would help to prevent situations which could cause a tow line to part or a barge to be lost.³⁵² Likewise, the fire protection rules were extended to apply to all towing vessels, rather than to just those towing non-self-propelled tank vessels, as directed by the CGAA.³⁵³ The Coast

347. The rule explicitly excludes vessels operating in internal waters from these standards, citing the semi-sheltered conditions and opportunity for quick haven as mitigating factors in internal waters, allowing for less stringent safety regulations. *See id.* at 52,059.

348. The TSAC is an advisory panel consisting of representatives from the USCG and the towing industry. The CGAA mandated that the Coast Guard develop this rule in consultation with the TSAC. *See id.* at 52,058, 52,063.

349. The CGAA required the Coast Guard to develop safety measures for fire suppression and anchoring and barge retrieval of single hull tank barges. The Coast Guard determined that similar requirements for emergency towing apply to both single and double hull vessels, and reasoned that to provide a reduced standard for double hull vessels would be to "detract from the existing requirements of OPA 90." *See* 62 Fed. Reg., *supra* note 345, at 52,059.

350. *See id.* at 52,060.

351. The Coast Guard reasoned that tow wire maintenance and voyage planning are key factors to prevent tug and barge separation. These issues were addressed in the rulemaking to complement the barge retrieval and anchoring provisions, with the intention that requiring proper planning and tow wire maintenance would help to prevent lost barge situations. *See id.* at 52,063.

352. *See* NVIC 5-92, Guidelines for Wire Rope Towing Hawsers, available through U.S. Coast Guard. *See also* 62 Fed. Reg., *supra* note 345, at 52,063.

353. The Coast Guard states in the Oct. 6 proposed rule that engine room fires are a persistent risk in the towing vessel industry, and that all such fires pose a potential threat to maritime commerce, regardless of the type of vessel in tow. Likewise, by applying the requirement to all towing vessels, operators would have more flexibility over the cargoes

Guard also integrated crew training requirements into both parts of the rulemaking, recognizing the prevalent role of human error in most marine casualties.³⁵⁴ Finally, the rulemaking considered the issue of fuel system failure as it relates to towing vessel fires, and developed proposed regulations for fuel system shutoff standards to complement other fire prevention measures.³⁵⁵

The fire suppression system requirements and related provisions in the Coast Guard rulemaking resulted almost exclusively from the recommendations of the TSAC.³⁵⁶ The provisions in the proposed rule were designed to accomplish three objectives: 1) to improve fire detection capabilities; 2) to improve the means for extinguishing engine fires; and, 3) to improve fire fighting training for vessel crew.³⁵⁷ The rule required that within two years of the effective date, all towing vessels would be equipped with a general alarm capable of alerting all vessel crew of a fire on board.³⁵⁸ The proposed rule also required that within two years of the effective date, all towing vessels have a fire detection system in the engine room capable of detecting fires in the earliest stages, and that the vessels also have a communication system in place between the engine room and the wheelhouse.³⁵⁹ The Coast Guard also proposed that all existing towing vessels, within two years, be equipped with a fire pump and fire main as well as portable fire extinguishers, and that remote engine shutdowns or fuel pump shutoffs be installed in towing vessel engines.³⁶⁰ New vessels would be required to be constructed with these extra safety features, and additional

they may tow. See 62 Fed. Reg., *supra* note 345, at 52,059.

354. These include training and drill requirements and anti-fatigue policies which apply to operators, management, and crew. See *id.* at 52,058.

355. The rulemaking refers several times to an analysis of towing vessel casualties which occurred between 1992 and 1995. This study indicated that approximately 40% of all towing vessel fires involved a fuel system failure, and took this statistic to indicate the need to develop minimum standards for fuel systems on towing vessels. These minimum requirements are comparable to those developed for the commercial fishing industry and codified at 46 C.F.R. § 28.335. See *id.* at 52,062 (1997).

356. See *id.* at 52,060.

357. See *id.*

358. *Id.* at 52,061. Under the proposed rule, existing vessels would be able to choose between an audible and visual alarm, and new vessels would be required to possess both forms. See *id.*

359. *Id.* For new vessels, the communication system would have to be permanent, however for existing vessels, this system could consist of portable radios or other non-permanent means. See *id.*

360. *Id.* at 52,061-62.

fuel system standards would also apply exclusively to new vessels.³⁶¹ The proposed rule required that fire axes be located on board towing vessels, and that vessel masters or owners develop fire fighting procedures and training and orientation standards for all crew members.³⁶²

While the Coast Guard rulemaking expanded on the fire suppression requirements specified in the Coast Guard Authorization Act, its contents did not match the stringency of the Rhode Island law or the RRAT recommendations for anchoring and barge retrieval requirements. While the RRAT report recommended redundant retrieval devices on tank barges, namely operable anchors as well as a barge retrieval system,³⁶³ the Coast Guard rulemaking only required one type of retrieval device.³⁶⁴ Moreover, the proposed rule specified that only manned barges were required to have operable anchors on board, and that unmanned barges must only have an extra tow wire or other comparable retrieval device on the tug in order to be in compliance with federal law.³⁶⁵ By comparison, the Rhode Island Tank Vessel Safety law required both an anchor and retrieval device for manned barges, and for unmanned barges also required that a third, redundant retrieval device be present on the tug.³⁶⁶

The Coast Guard's reason for relying on the less stringent barge retrieval standard was to prevent loss of life on barges by removing the possibility that a crewmember would be placed on a previously unmanned barge to deploy an anchor during an emergency.³⁶⁷ However, this reasoning is inconsistent with the facts of the *North Cape* incident, where despite high seas and strong winds, crewmembers were successfully placed on the unmanned barge and, had the anchor been in working condition, might have

361. Existing vessels were exempted from this requirement because of the mechanical logistics and costs associated with altering existing fuel system configurations. See 62 Fed. Reg., *supra* note 345, at 52,062.

362. *Id.*

363. See UNITED STATES COAST GUARD REG'L RISK ASSESSMENT TEAM, *supra* note 298. An approved barge retrieval system might consist of an extra tow wire on the tug. See previous textual discussion of RRAT report recommendations for retrieval systems, *supra* Part IV.B.1.

364. 62 Fed. Reg., *supra* note 348, at 52,060. This lesser requirement is consistent with the direction in section 901 of the Coast Guard Authorization Act of 1996. See Pub. L. No. 104-324, Title IX, § 901, 110 Stat. 3946 (1996) (codified as amended at 46 U.S.C.A. § 3719 (West Supp. 1998)).

365. See *id.* at 52,060. The Coast Guard chose not to require operable anchors on unmanned barges because of unacceptable risk to mariners. *Id.*

366. R.I. GEN. LAWS § 46-12.6-9 (1997).

367. See 62 Fed. Reg., *supra* note 345, at 52,060.

been able to deploy the anchor and prevent the casualty which resulted.³⁶⁸ In the *North Cape*, as in any such incident, the decision to deploy crew to an unmanned barge lay with the vessel master. Protection of human life is always the highest priority in any emergency, and most would argue that the presence of a working anchor on a tank barge would not necessarily precipitate a situation in which a vessel master would compromise the safety of a crewmember.³⁶⁹ In addition to these human safety issues, the Coast Guard rulemaking cited the "unwarranted costs on the industry" associated with requiring both anchors and retrieval devices.³⁷⁰

In the federalism analysis which accompanied the proposed rule, the Coast Guard made a fairly strong statement regarding the implications of the proposed regulations for provisions in the Rhode Island law.³⁷¹ The rulemaking explicitly states that "when these rules are published as final and go into effect, they may preempt certain provisions of the Rhode Island State law, or other State laws, that differ from or exceed Coast Guard regulations."³⁷² While this statement clearly implies that the anchoring requirements and fire suppression equipment provisions in the Rhode Island law³⁷³ shall be preempted by the finalized Coast Guard rule, the lifting provision in the Rhode Island law would only apply if the Coast Guard barge retrieval standard were comparable to the Rhode Island requirements, which they are not.³⁷⁴ It is reasonable to assume that the Coast Guard rule would have supremacy over the Rhode Island law, and that if and when a final rule is issued, the rule will indeed cause portions of the Rhode Island law to be preempted. However, an analysis of the non-preemption clause in OPA could lead to a different conclusion altogether.

The legislative history of the Oil Pollution Act includes an intense debate on the issue of preemption, which resulted in the inclusion of explicit non-preemption language in the Act, preserving state regulatory

368. See previous textual discussion of the *North Cape* spill, *supra* Part I.A.

369. While it is impossible to predict the actions of individuals in an emergency situation, Vessel Response Plans, which are the OPA 90-required contingency plans that all U.S. tank vessels and oil facilities prepare and use as the basis for spill response planning, always prioritize protection of human life during an emergency.

370. 62 Fed. Reg., *supra* note 345, at 52,063.

371. *Id.* at 52,066.

372. *Id.*

373. Gen. Laws § 46-12.6-12 (1997).

374. See previous textual discussion describing the lesser standard in the Coast Guard proposed rule, *supra* p. 265.

authority in the arena of oil pollution prevention.³⁷⁵ Because the contents of the Coast Guard rulemaking result from an amendment to OPA, the issue of preemption of state law by a coast Guard rule remains open to interpretation. While the rulemaking states that the Rhode Island anchor provisions, which exceed the proposed rule, will be preempted by the impending Coast Guard regulations, the non-preemption language in OPA 90 suggests that these Rhode Island requirements could be interpreted as an expression of the state's concurrent jurisdiction as provided by OPA. Because all vessels which comply with the stricter Rhode Island provision would also be in compliance with the new federal regulations, conflict preemption does not necessarily apply.³⁷⁶ The federalism analysis in this case, then, may not be as simple as the statement in the Coast Guard rulemaking implies, and may instead require a more in-depth analysis of the blurred jurisdictional boundaries between state and federal regulatory authority in the field of oil spill prevention. Resolution of these broader issues may indeed be the final component of the *North Cape's* considerable contribution to the field of oil spill policy.³⁷⁷

Several comments concerning the Coast Guard rule, submitted by the January 5, 1998 closing date, indicate disappointment in the perceived weakness of the proposed rules. Trudy Coxe, Secretary of Environmental Affairs for the Commonwealth of Massachusetts, wrote that she was

375. 33 U.S.C.A. § 2718(a)(1)(a) (West Supp.1998). The non-preemption clause reads as follows: "Nothing in this [Act] shall . . . affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to . . . the discharge of oil . . ." *Id.*

376. Generally, the existence of preemption in a given area of law is determined in one of three ways. Preemption may be indicated by direct Congressional intent, by implied intent ("field preemption"), or through "conflict preemption." The non-preemption language in OPA precludes the possibility for explicit or implied preemption. Conflict preemption occurs when state and federal laws conflict such that satisfying a state law could mean violating a federal law. See generally Steven A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768-70 (1994).

377. One author has characterized oil pollution law as existing at the "crossroads of environmental and maritime law." See Jean Cameron, Executive Director States/BC Oil Spill Task Force, States and Provinces: Standing at the crossroads of environmental and maritime law, presented to the Tanker Legislation Conference '95, Washington, D.C. (September 1995). Environmental law and policy, as it has evolved in the United States, delegates a great deal of authority to the states, and in fact often encourages the promulgation of more stringent state standards. By contrast, maritime law is firmly rooted in the principles of federal supremacy, to protect the "harmony and uniformity" of national maritime law. See U.S. CONST. art. III, § 2. Rhode Island's legislative response to the *North Cape* spill provides a perfect illustration of the conflict between these opposing principals.

"disappointed . . . that the proposed rules . . . do not, in most instances, follow the recommendations of [RRAT]."³⁷⁸ Coxe's principal objection was that the proposed rule does not require all barges to be manned and have an operable anchor system.³⁷⁹ John Torgan, Narragansett Baykeeper, writing on behalf of the environmental organization Save the Bay, said the "proposed rule . . . falls well short of the measures recommended by the RRAT report, and is significantly weaker than the Rhode Island statute it is designed to preempt."³⁸⁰ Torgan also identified the failure to require an operable anchor system as one of his principal objections.³⁸¹

The most critical comments, however, came from Sheldon Whitehouse, the U.S. Attorney who led the successful criminal prosecution of Eklof Marine.³⁸² Whitehouse focused his comments on the fire suppression and anchoring system sections of the proposed rule. He made the startling observation that although the *North Cape* disaster was obviously the inspiration for the regulatory effort, the proposed rule would not prevent the same accident from occurring again. With regard to fire suppression, he asserts that "the *Scandia's* fire suppression system, which was *not* capable of suppressing an engine room fire, would have easily met the requirements of the proposed regulations."³⁸³ Why? The existing tug fleet is *exempt* from the requirement for installation of a total flooding, or "gaseous suppression system" in the engine room – where nearly all fires originate.³⁸⁴ With regard to anchoring systems, the proposed rule would *legitimize* the status of the *North Cape* – an unmanned barge without an operable anchor system.³⁸⁵ It would be required to have only an "emergency retrieval system"³⁸⁶ (an extra tow line), which would have made no

378. Letter from Trudy Coxe, Secretary of Environmental Affairs for the Commonwealth of Massachusetts, to Executive Secretary, Marine Safety Council, on CGD 97-064, Notice of Proposed Rulemaking, 1 (Dec. 30, 1997) (on file with the *Ocean and Coastal Law Journal*).

379. Commonwealth of Massachusetts Comments Submitted in Response to Notice of Proposed Rulemaking on Towing Vessel Safety (CG-97-064), *id.* at Attachment 1.

380. Letter from John Torgan, Save the Bay, to Executive Secretary, Marine Safety Council on CGD 97-064, 1 Notice of Proposed Rulemaking (Jan. 5, 1998) (on file with the *Ocean and Coastal Law Journal*).

381. *Id.* at 2.

382. Letter from Sheldon Whitehouse, U.S. Attorney, District of Rhode Island, to Executive Secretary, Marine Safety Council, on CGD 97-064, Notice of Proposed Rulemaking (Jan. 2, 1998) (on file with the *Ocean and Coastal Law Journal*).

383. *Id.*

384. *Id.* at 5-6.

385. *Id.* at 7.

386. *See id.*

difference under the facts of the *North Cape* disaster – the *Scandia* was on fire, and there was no other vessel able to pick up the tow. Only an operable anchor system had the potential to stop it under those circumstances. Whitehouse concludes his review of the Coast Guard's effort with the following:

Most important, the regulations, if put into effect as drafted, would create a standard of care inconsistent with and much lower than the standard of care established by the criminal case. In the criminal case, the defendants were charged with and admitted to being negligent in failing to provide an adequate fire suppression system on the tug *Scandia* and in failing to provide a working anchor system on the unmanned barge *North Cape*. The regulations require neither. In other words, the standard of care set by the proposed regulations is so low that anyone who follows them to the letter and does nothing more may still be guilty of criminal negligence.³⁸⁷

V. CONCLUSION

The *North Cape* oil spill has been remarkable in many respects. As the vessels drifted toward shore, the tug *Scandia* ablaze, the barge *North Cape* plunging wildly in the building seas, the crew of Coast Guard Station Point Judith performed a brilliant rescue of the *Scandia* crew in the January blizzard. However, they were powerless to prevent the environmental disaster to come. Over 828,000 gallons of fuel oil contaminated hundreds of square miles of coastal waters as the *North Cape* ran aground and split its tanks just off pristine Moonstone Beach. The enormous loss of wildlife is still being calculated some two years after the spill. The long-term future of the lobster population, with as many as 12 million crustaceans lost, is uncertain. Over 600 private claimants still await their day in court.³⁸⁸ Much uncertainty remains, but the legacy of the *North Cape* as a galvanizing incident in the development of marine policy is becoming clear.

New environmental criminal law was made, as the owners of the vessels admitted that the failure to have a fire suppression system aboard the *Scandia* and a workable anchor system aboard the *North Cape* was

387. *Id.* at 9.

388. See Mooney and Malinowski, *supra* note 31.

criminal negligence under the terms of the Oil Pollution Act of 1990. Record criminal fines were paid, and will be used to acquire and restore critical habitat along Rhode Island's south shore. As a requirement of probation, the entire Eklof fleet of some forty vessels will now carry substantially upgraded safety equipment or face another million dollar fine.

Shocked by the virtual vacuum of federal regulations over the tug and barge industry, little Rhode Island led an effort to introduce basic safety requirements for this industry. Rhode Island walked a narrow line – always recognizing the supremacy of federal law, where it existed, but jealously guarding the right of self-protection if the federal government failed to act. Rhode Island is best described as a thin strip of land along the borders of Narragansett Bay and Rhode Island Sound. The state's official seal is an anchor. It was incomprehensible to this historic maritime community that federal law allowed barges like the *North Cape* to traverse our waters without one. Despite claims that any effort to regulate marine safety was preempted by federal law, and despite threats that a state law might lead to an oil embargo, Rhode Island passed one of the toughest barge safety laws in the country.

Instead of embracing this call for safer operations, the tug and barge industry actively lobbied for a repeal of the new law. The law was indeed modified a year later, but remained one of the toughest in the nation. After years of inaction, the Coast Guard finally developed its legislative mandate and announced new proposed rules for towing vessel safety, but they appear to have been heavily influenced by the industry voices of the Towing Safety Advisory Committee. Incredibly, the new rules would allow the *Scandia* and *North Cape* disaster to occur today, as the rules do not require an adequate fire suppression system or an operable anchor to be onboard. It remains to be seen if the final Coast Guard rule will correct these glaring inadequacies.

The real legacy of the *North Cape* oil spill is that the process of creating a safer operational environment has begun.****

*****Editor's Note:* The Coast Guard recently announced that it was shifting its approach from requiring only one of three emergency control systems, to requiring an operable anchoring system on single-hull tank barges. 63 Fed. Reg. 71,756 (1988). Much like the conclusion reached by the authors of this article, the Coast Guard determined that an operable anchoring systems is an essential measure to reduce the chances of oil spills from single-hull tank barges. *Id.* at 71,755.